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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

WILLIAM G. HALE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-captioned case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–33A) is reported at 498 F. 2d 1038.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 34A–35A) was entered on May 21, 1974. On August 1, 1974, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* (four judges dissenting) (Apps. C and D, *infra*, pp.

36A–38A). On August 26, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 30, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, respondent was convicted of robbery, in violation of 22 D.C. Code 2901. Imposition of sentence was suspended, and he was placed on probation for three years. On appeal, the court of appeals reversed respondent's conviction.

1. The government's case rested largely on the testimony of Lonnie Arrington, the complaining witness, who testified that respondent was among five men who robbed him of $96 (Tr. 25–30). The record indicates that soon after the robbery, respondent was arrested, taken to the police station and informed of his rights under *Miranda* v. *Arizona,* 384 U.S. 436, including his right to remain silent. He was then searched

and found to be in possession of $158. At trial, respondent testified on his own behalf and explained his possession of the money by stating that his estranged wife had received her welfare check that day and had given him about $150 so that he could purchase some money orders for her (Tr. 217–219). In an effort to impeach this testimony, the prosecutor on cross-examination led respondent to admit that he had not offered that explanation to the police at the time of his arrest (Tr. 259):

> Q. Did you in any way indicate [to the police] where that money came from?
>
> A. No, I didn't.
>
> Q. Why not?
>
> A. I didn't feel that it was necessary at the time.
>
> Q. You were advised of your rights, were you not?
>
> A. Yes.

Immediately following this exchange, the district court cautioned the jury that the questioning was improper and that they could disregard it.[1]

---

[1] The court stated (App. A, *infra*, p. 17A):

"He is not required to indicate where the money came from. There is no responsibility on his part in regard to that. * * * I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest."

The majority in the court of appeals rejected the notion that this caution to the jury overcame the effect of the impropriety it found in the prosecutor's questions (App. A, *infra*, p. 13A). We, of course, disagree with the statement of the district court and the conclusion of the court of appeals that the questioning

2. In a 2–1 decision, the court of appeals ruled that this cross-examination was improper and required a new trial. The majority reasoned that *Griffin* v. *California,* 380 U.S. 609, barring comment to the jury upon a defendant's failure to testify at trial, similarly barred disclosure of a defendant's assertion of his Fifth Amendment privilege during police interrogation. Moreover, since respondent was told that he had a right to remain silent during interrogation, his failure to explain to the police the source of the money found on his person was considered to be not inconsistent with his subsequent trial testimony. The majority relied in this regard upon *Grunewald* v. *United States,* 353 U.S. 391, in which this Court barred cross-examination of a defendant as to the prior assertion of his Fifth Amendment privilege before a grand jury.

Judge Wilkey dissented on the ground, *inter alia,* that a defendant who testifies at trial waives the privilege against self-incrimination and is subject, as any other witness, to extensive cross-examination calculated to test his credibility (App. A, *infra,* pp. 17A–31A). Relying upon *Harris* v. *New York,* 401 U.S. 222, in which the Court held that a defendant could be impeached by statements given the police in the absence of sufficient *Miranda* warning, Judge Wilkey reasoned that a defendant's failure to offer the police an explanation of incriminating circumstances should be disclosed to the jury in order to enable it reasonably to evaluate the credibility of the defendant's trial testimony.[2]

was improper. In any event, we do not rely here on any argument that the district court's caution to the jury was sufficient to obviate the error, if error there was. See note 2, *infra.*

REASONS FOR GRANTING THE WRIT

This case presents the important question whether the prosecution can test the credibility of a defendant's trial testimony by bringing to the attention of the jury his failure to offer the same information at the time of arrest. The circuits are in sharp conflict on this question. In addition to the court below, the Second, Sixth, Ninth, and Tenth Circuits have barred cross-examination of a defendant that discloses his silence during police interrogation.[3] The Third and Fifth Circuits, however, have permitted such cross-examination.[4]

[2] Judge Wilkey also relied for his dissent on the alternative ground, rejected by the majority (App. A, *infra*, pp. 12A–15A), that, even if the questioning were deemed improper, the defect was harmless beyond a reasonable doubt and therefore did not warrant reversal of respondent's conviction (App. A, *infra*, pp. 31A–33A). While we agree with Judge Wilkey's analysis of this issue, the controversy on the point involves the application of an essentially undisputed standard to the facts of a particular case. Accordingly, we do not believe that the issue is appropriate for presentation to the Court in this case, and we do not seek review of that aspect of the court of appeals' holding.

[3] See *United States* v. *Semensohn*, 421 F. 2d 1206 (C.A. 2); *United States* v. *Brinson*, 411 F. 2d 1057 (C.A. 6); *Robideau* v. *Rhay*, 431 F. 2d 880 (C.A. 9); *Fowle* v. *United States*, 410 F. 2d 48 (C.A. 9); *Johnson* v. *Patterson*, 475 F. 2d 1066 (C.A. 10), certiorari denied, 414 U.S. 878; *Deats* v. *Rodriguez*, 477 F. 2d 1023 (C.A. 10).

[4] See *United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234 (C.A. 3); *Agnellino* v. *New Jersey*, 493 F. 2d 714 (C.A. 3); *United States* v. *Quintana-Gomez*, 488 F. 2d 1246

The existence of an adequate opportunity to test the credibility of a defendant who takes the stand in his own behalf is crucial to the mission of a trial—accurate ascertainment of the truth. In disallowing a form of cross examination that exposes a testifying defendant's prior failure to explain seemingly incriminating circumstances, the court below effectively rendered a defendant immune from one of the "traditional truth-testing devices of the adversary process." *Harris* v. *New York,* 401 U.S. 222, 225.

(C.A. 5); *United States* v. *Ramirez*, 441 F. 2d 950 (C.A. 5), certiorari denied, 404 U.S. 869.

The position of the Third Circuit is not altogether clear. In *Burt*, *supra*, the defendant testified that the shooting death for which he had been charged with murder had been accidental. The prosecution elicited on cross-examination the fact that, when he had been arrested soon after the shooting for an unrelated crime, the defendant had not sought to secure assistance for the victim. The lead opinion in *Burt* held that the cross-examination was permissible because the defendant's silence during police interrogation had occurred before he stood accused of the murder. The other two members of the panel, however, issued a concurring opinion on the ground that *Harris* allows impeachment by prior silence at a police station.

In *Agnellino*, *supra*, the defendant made statements to the police but failed to indicate the source of stolen goods that were found on his property. He testified at trial that he had purchased them. During closing argument the prosecutor commented upon the defendant's prior failure to provide this information to the police. The lead opinion, relying upon the concurring opinions in *Burt*, held that the prosecutor's comment was permissible. The other two members of the panel, however, concurred on the basis that what the defendant had *told* the police was inconsistent with his trial testimony. They viewed *Burt* as a situation in which the defendant's *conduct* in not seeking assistance for the shooting victim was inconsistent with his testimony at trial that the shooting had been accidental.

Certiorari should be granted to resolve this conflict among the circuits in an important area of criminal procedure.

1. A defendant who takes the stand puts himself in a fundamentally different position from one who does not. Once on the stand he is subject like any other witness to cross-examination designed to assure the reliability of his testimony. "There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness." *Raffel* v. *United States,* 271 U.S. 494, 499. A defendant's alibi or exculpatory testimony—often central to his case—should not be given special immunity from impeachment. Once he testifies, he may be cross-examined as to any matters reasonably related to the subject of his direct examination—including matters which otherwise could not be commented upon, such as prior convictions, *Spencer* v. *Texas,* 385 U.S. 554, 561; refusals to testify on his own behalf at prior trials, *Raffel* v. *United States, supra;* or inconsistent statements made during police interrogation without prior *Miranda* warning, *Harris* v. *New York, supra.*

A defendant's silence during police interrogation should be no exception to this principle. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that an accused failed to testify or remained silent, where he testifies a jury should be permitted to assess the credibility of his story by learning that he is telling it to the authorities for the first time in court.

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Contrary to the assertion of the court below, it seems to us speculative and even unlikely as an empirical matter that a defendant will be deterred from invoking his Fifth Amendment privilege during police interrogation by the mere possibility that he might wish to waive it at trial and that, if he did so, he might be called upon to explain why he had not offered his story to the authorities during interrogation. But even if it had some such effect, it does not follow that this represents an impermissible "penalty" on the exercise of the constitutional right; rather, we submit that it represents a proper consequence of the defendant's election to withhold any explanation of suspicious circumstances from the police, while choosing to provide one at trial. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel, supra,* 271 U.S. at 499. Nor is the defendant's decision whether to testify at trial any more "fettered" by the possibility that he may be asked to explain why he had not before offered his story than it is by the possibility that he may be asked about prior convictions or refusals to testify on his own behalf at prior trials. "It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case." *McGautha* v. *California,* 402 U.S. 183, 213.

On the other hand, having chosen to waive the privilege at trial, a defendant should not then be permitted to take advantage of his prior invocation of it by having his present testimony immunized from ac-

curate evaluation by a particular line of probative inquiry. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense * * *." *Harris* v. *New York, supra,* 401 U.S. at 226.

2. *Griffin* v. *California,* 380 U.S. 609, and *Miranda* v. *Arizona,* 384 U.S. 436, both relied upon by the majority below are not inconsistent with this principle. *Griffin,* barring comment to the jury upon a defendant's failure to testify, did not overrule *Raffel, supra,* which permitted cross-examination of a defendant as to why he refused to take the stand at a prior trial when his purpose in testifying was to rebut a witness who offered the same testimony at both trials.[5]

Similarly, *Miranda's* dictum that "[t]he prosecution may not * * * use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation * * *" (384 U.S. at 468, n. 37) is, in light

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[5] Since at the time *Raffel* was decided it was already the rule in federal courts that no comment could be made upon a defendant's failure to take the stand, see *Wilson* v. *United States,* 149 U.S. 60; 18 U.S.C. 3481, it seems clear that the Court did not intend to overrule *Raffel* or even call its holding into question by its ruling in *Griffin.*

Nor is *Stewart* v. *United States,* 366 U.S. 1, cited by the majority below, inconsistent with *Raffel.* In *Stewart,* a defendant who pleaded not guilty by reason of insanity took the stand and made various unintelligible statements. During cross-examination the prosecutor elicited the fact that the defendant had not testified during two previous trials, which had resulted in convictions that were reversed on appeal. In ruling this cross-examination improper, the Court noted that neither *Raffel* nor *Grunewald* was applicable, since the cross-examination in *Stewart* sought to discredit the claim of insanity rather than impeach the defendant's testimony.

of *Harris'* holding that statements improperly obtained may nevertheless be used for impeachment, correctly understood as a bar to the use of a defendant's silence during interrogation in the government's case in chief. But—following the logic of *Raffel* and *Harris*—it would not prohibit asking a defendant on cross-examination, for the purpose of impeaching his trial testimony, why he remained silent at the time of arrest.

3. Accordingly, once a defendant takes the stand in his own behalf, the Fifth Amendment does not bar reference to his prior silence for the purpose of impeaching his testimony. The Fifth Amendment limits such cross-examination only when its prejudicial impact will outweigh its probative value.

Thus, in *Grunewald* v. *United States,* 353 U.S. 391, also relied upon by the majority below, this Court barred cross-examination of a defendant as to his silence before a grand jury, not because the defendant had there asserted his Fifth Amendment privilege, but because, in the circumstances of the case, the probative value of the silence was thought to be outweighed by its potential prejudicial impact upon the jury (*id.* at 420):

> [W]e may assume that under *Raffel* [the defendant] in this case was subject to cross-examination impeaching his credibility just like any other witness, and that his Fifth Amendment plea before the grand jury could not carry over any form of immunity when he voluntarily took the stand at the trial. This does not, however, solve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of [the defendant's] credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury.

The Court determined that the defendant's silence before the grand jury was not probative, in that it was not inconsistent with his testimony at trial. Had the defendant answered questions put to him before the grand jury in the same way he subsequently answered them at trial, he would have incriminated himself, since an unexplained admission before the grand jury that he knew one of the co-defendants would have linked him with a criminal conspiracy. *Id.* at 422. Moreover, by the time he refused to answer the grand jury's questions, the defendant had already secured the advice of counsel, and the grand jury had already heard testimony from his co-defendants. In these circumstances, the Court reasoned, "many innocent men who know that they are about to be indicted will refuse to help create a case against themselves * * *." *Id.* at 423.

Looking to the other side of the balance, the Court in *Grunewald* feared that knowledge of a defendant's refusal to testify on the specific Fifth Amendment ground that his answers might tend to incriminate him would prejudice the jury against him. *Id.* at 424. "Weighing the factors," the Court concluded that it was prejudicial error for the trial court to permit cross-examination of the defendant on his invocation of the Fifth Amendment privilege before the grand jury.

Here, however, the balance between probative value and prejudicial impact tips in the other direction. Had the respondent explained to the police that his wife gave him the money, as he subsequently explained at trial, he would not have incriminated himself. Thus there is reason to suppose that, even after receiving the *Miranda* warnings, he might well have offered such an explanation. His failure under these circumstances to explain to the police the source of the money found on his person soon after the robbery therefore cast some real doubt upon his explanation at trial. Moreover, his interrogation occurred soon after he was apprehended—before he had any firm idea that evidence was being gathered against him. Thus, unlike the defendant in *Grunewald,* respondent was not so far along in the criminal process that his refusal to provide an explanation was likely to reflect a tactical decision.

Moreover, cross-examination in the instant case presented little chance of prejudice. The jury was not told that respondent had remained silent before the police, or that he had invoked his Fifth Amendment privilege.[6] Rather, the government's cross-examination merely disclosed that respondent had not explained to the police the circumstances surrounding his possession of the money. Respondent replied at trial that he had not offered the explanation to the police because

[6] Indeed, it may well be questioned whether, strictly speaking, the right to stand silent before the police is directly derived from the privilege against self-incrimination or has other sources, since the right of silence is not, unlike the ordinary invocation of the privilege, contingent upon any claim that a response might be incriminating.

"he didn't feel it was necessary at the time." The jury might infer from this colloquy that the defendant was not telling the truth about the source of the money. It is unlikely, however, that the jury would infer from this that he had remained silent before the police because he feared he would otherwise incriminate himself. As this Court said in *Griffin, supra,* "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." 380 U.S. at 614.

In sum, the decision below not only misapplied *Griffin, Miranda,* and *Grunewald* to the circumstances of this case, but in so doing it created an unwarranted immunity from cross-examination for a defendant who chooses to take the stand.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1974.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 72-1848

UNITED STATES OF AMERICA

v.

FLEMMING ANDERSON, APPELLANT

No. 72-2066

UNITED STATES OF AMERICA

v.

WILLIAM G. HALE, APPELLANT

Appeals from the United States District Court for the District of Columbia

Decided May 21, 1974

*Louis Briskman** with whom *Sherman L. Cohn, Larry Ritchie,* and *Alan Gover** (all appointed by this court) were on the brief, for appellants.

David G. Larimer, Assistant United States Attorney, with whom *Harold H. Titus, Jr.,* United States Attorney, *John A. Terry* and *John R. Dugan,* Assistant United States Attorneys, were on the brief, for appellee.

Before: BAZELON, *Chief Judge,* WISDOM**, *United States Circuit Judge* for the Fifth Circuit, and WILKEY, *Circuit Judge.*

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*Entered appearance as student counsel pursuant to Rule 20 of the General Rules of this court.

**Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

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Opinion for the Court filed by *Chief Judge* BAZELON.
Dissenting Opinion filed by *Circuit Judge* WILKEY.

BAZELON, *Chief Judge:* In a joint trial appellants were convicted by a jury of robbery. Anderson received a two to eight year sentence; imposition of Hale's sentence was suspended, and he was placed on probation for three years. Hale seeks reversal on the ground that the prosecutor impermissibly sought to elicit his reason for not asserting his alibi to the police when arrested. Anderson seeks reversal on the ground that he was prejudiced by several comments in Hale's closing argument. We reverse Hale's conviction, and affirm Anderson's.[1]

I

The government's case rested largely on the testimony of Lonnie Arrington, the complaining witness. Arrington testified that on June 1, 1971, he was on his way to purchase a pair of shoes when he stopped to chat with Hale, whom he had seen in the neighborhood, but did not know by name. Hale then followed him into the shoe store. Upon leaving, Arrington was accosted and robbed by a group of men. He immediately reported the robbery to the police. At first he claimed that $65 had been stolen, but later, after checking with his wife, he changed the figure to $96. While waiting for the police to escort him through the neighborhood in search of his attackers, Arrington noticed two men, and shouted "there go [*sic*] a guy that was in the robbery." When the police ran toward the two men, they fled. Upon their capture, Arrington

[1] Both appellants argue that the trial court's refusal to grant a motion for judgment of acquittal was erroneous since the testimony of the complaining witness was "inherently incredible." We find sufficient evidence to sustain the verdicts. The question of credibility was for the jury. *See, e.g., Bush* v. *United States*, 375 F. 2d 602 (D.C. Cir. 1967).

identified Hale as one of the robbers. Several months later, Arrington picked out Anderson from a group of photos shown to him by the police, and then identified him at a lineup.

The arresting officer testified that Hale had $123 in his pocket and $35 in his wallet when arrested. He also claimed that Arrington had stated, before Hale had been arrested, "that he believed one of [the robbers] was a man by the name of Billy Hale." This testimony directly contradicted Arrington's earlier testimony to the effect that he did not "tell the police [Hale's name], because I didn't know if it was [him] or not."[2]

Hale took the stand in his own defense and testified that he had encountered Arrington on the day in question. He asserted, however, that after separating from Arrington he was approached by three men who asked if Arrington had any money, and that he replied he "didn't know." Hale claimed that he then went to the Narcotics Treatment Center where he remained during the time of the alleged robbery.[3] He left the Center with a friend who subsequently purchased narcotics. Shortly after the purchase, the two men

[2] Arrington also stated that there was a witness to the robbery, who was never identified, who had told him that one of the robbers was named "Billy Hale or Bobby Hale." Although he initially testified that he did not identify Hale by name to the police, his subsequent testimony is confused. Counsel for Hale asked: "So you neglected to mention to the police that one of the individuals had given you the name of one of the robbers, is that right?" And Arrington answered, "I told them." The record does not reveal what it is that Arrington told the police.

[3] An administrator from the Center testified that his records indicated that Hale had visited the Center on the day in question, but that they did not reveal the time of the visit.

were approached by the police, and Hale fled because he feared another drug conviction.[4]

Hale also testified that his estranged wife had received her welfare check on the day in question, and that she had given him about $150 so that he could purchase some money orders for her as he had done in the past.[5] His wife corroborated this testimony.

Anderson presented no evidence.

II—Hale's Claim

Appellant Hale argues that the trial court committed reversible error in failing to grant his motion for a mistrial after the prosecutor, on cross-examination, elicited from Hale an admission that he had not explained to the police the presence of $158 found on his person at the time of arrest. We find that: (A) the prosecutor's question was constitutionally impermissible; and (B) the court's failure to declare a mistrial was prejudicial error.

A.

The record indicates that after arrest appellant was taken to the police station and informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including his "right to remain silent."[6] He was then searched and found in possession of $158. A police

[4] Hale claimed that his previous conviction resulted from being arrested in the presence of a friend who was in possession of narcotics.

[5] The owner of a local liquor store testified that he knew Hale, and that Hale had purchased money orders from him on several occasions.

[6] Tr. at 259.

interrogator thereupon asked "[w]here did you get the money?" Hale made no response.[7]

At trial, in an effort to impeach Hale's testimony that he was carrying a large sum of money because his wife had received her welfare check and had asked him to purchase some money orders for her, the prosecutor led Hale to admit that he had not offered that explanation to the police at the time of his arrest:

> Prosecutor. Did you in any way indicate [to the police] where the money came from?
>
> Hale. No, I didn't.
>
> Prosecutor. Why not?
>
> Hale. I didn't feel it was necessary at the time.[8]

In *Miranda*, after holding that a defendant had a right to be advised that he could remain silent in the face of police interrogation, the Supreme Court went on to note:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.* 384 U.S. at 468 n. 37 (emphasis supplied).[9]

Relying on this dictum, several Circuits,[10] including

[7] Tr. at 262.

[8] Tr. at 259.

[9] *See also Schmerber* v. *California* 384 U.S. 757, 765–66 n. 9 (1966).

[10] *See, e.g., Fowle* v. *United States*, 410 F. 2d 48 (9th Cir. 1969); *United States* v. *Brinson*, 411 F. 2d 1057 (6th Cir. 1969); *United States* v. *Semensohn*, 421 F. 2d 1206 (2nd Cir. 1970). *See also Fagundes* v. *United States*, 340 F. 2d 673 (1st Cir. 1965). *But see Sharp* v. *United States*, 410 F. 2d 969 (5th Cir. 1969). The *Sharp* majority inexplicably omits reference to the portion of *Miranda* at issue despite forceful reliance on it by Chief Judge Brown in dissent. 410 F. 2d at 972.

our own,[11] have held that cross-examination of the sort in question in this case was improper.[12]

Recently, however, one Circuit has held,[13] and another has implied,[14] that *Harris* v. *New York*, 401 U.S.

[11] *Gillison* v. *United States*, 399 F. 2d 586 (D.C. Cir. 1968).

[12] Our dissenting colleague argues that the *Miranda* dictum is inapplicable to the facts of this case. The record, however, clearly indicates otherwise. Appellant was under police interrogation, the sort of "*accusation*" to which *Miranda* referred. *See* 384 U.S. at 444 & 468 n. 37. And, when he was asked "[w]here did you get the money?" he stood "*mute*." This fact was then "*use*[*d*]" against him "*at trial*." As the cases cited in note 10, *supra*, demonstrate, the *Miranda* dictum applies precisely to these facts. Nor would it matter, despite the suggestion by the dissent, that Hale answered some questions before remaining silent: "[T]here is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent * * *" *Miranda*, *supra*, 384 U.S. at 475–76. In fact, the record does not reveal whether appellant answered any questions or made any statements.

[13] *United States* v. *Ramirez*, 441 F. 2d 950 (5th Cir. 1971).

[14] In *United States ex rel. Burt* v. *New Jersey*, 475 F. 2d 234 (3rd Cir. 1973), a defendant was arrested for a crime other than the homicide at issue in the appeal before the Third Circuit. At trial he explained that the homicide was accidental. The court held that defendant was properly impeached by his silence at the police station because he had not been accused of committing any homicide, and therefore should have notified the police if he knew about an accidental homicide. Two judges issued a concurring opinion seemingly on the ground that *Harris* allows impeachment by prior silence at the police station.

In a subsequent case a different panel of the same Circuit held that it was improper to impeach a defendant by pointing out that he invoked another of his *Miranda* rights, namely, the right to an attorney. *United States ex rel. Macon* v. *Yeager*, 476 F. 2d 613 (3rd Cir. 1973). In the face of these two decisions a district court in the Third Circuit has recently held that a defendant can be impeached by his prior silence *only* when police interrogation does not concern the crime for which the defendant is subsequently indicted. The district court then concluded that cross-examination of the sort at issue in this case was improper notwithstanding *Harris*. *United States* v. *Holland*, 360 F. Supp. 908 (E.D. Pa. 1973).

222 (1971), undercuts the portion of *Miranda* quoted above, and permits cross-examination regarding a defendant's refusal to offer an alibi or explanation to his police interrogators.

In *Harris* the Court held that a defendant could be impeached by "prior inconsistent *utterances*" made at the time of his arrest even when they were made before the defendant was adequately apprised of his rights. The Fifth Circuit extended the *Harris* rationale to approve "the right of the prosecution to show [a defendant's] prior inconsistent *act of remaining silent* * * *."[15] The Tenth Circuit, on the other hand, has disagreed with the Fifth Circuit observing that:

> "silence at the time of arrest is not an inconsistent or contradictory statement. Silence at the time of arrest is simply the exercise of a constitutional right that all persons enjoy without qualification.[16]

We agree with the Tenth Circuit.

The premise underlying *Harris* is that if a defendant voluntarily gives statements to the police that *contradict* his trial testimony those statements are admissible because they are obviously relevant for assessing credibility. When, however, a defendant is informed that he has a right to remain silent, and then

[15] *United States* v. *Ramirez*, 441 F. 2d 950, 954 (5th Cir. 1971) (emphasis supplied).

[16] *Johnson* v. *Patterson*, 475 F. 2d 1066, 1068 (10th Cir. 1973). With respect to *Ramirez*, *supra*, the Tenth Circuit said, "[t]he premise of *Ramirez* is that silence at the time of arrest is an act inconsistent with the testimony given at trial. * * * We simply deny the validity of the premise." 476 F. 2d at 1068 n. 3. *See also Deats* v. *Rodriguez*, 477 F. 2d 1023 (10th Cir. 1973).

exercises that right, there is nothing inconsistent if he subsequently offers exculpatory testimony at trial. Virtually the same issue was considered in *Grunewald* v. *United States*, 353 U.S. 391 (1957). There, petitioner refused to answer several questions put to him before the grand jury "on the ground that the answers would tend to incriminate him and that the Fifth Amendment therefore entitled him not to answer." [17] At trial these same questions were answered "in a way consistent with innocence," and "the Government was allowed [for impeachment purposes] * * * to bring out in cross-examination that petitioner had pleaded his privilege before the grand jury as to these very questions." [18] The Court found that the exercise of the privilege was "wholly consistent with innocence," and therefore concluded, without dissent, that there was "no inconsistency" to support the cross-examination.[19] The Court relied on three factors: (*a*) petitioner repeatedly maintained his innocence before the grand jury; (*b*) a grand jury inquiry, unlike a trial, is in the nature of a secret proceeding, and "[i]nnocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings * * *"; [20] (*c*) "most important," at the time petitioner appeared

[17] 353 U.S. at 416. In the instant case Hale did not decline to answer on the ground that his answers might tend to incriminate him, but simply remained silent in the face of the police interrogator's instruction that he had "a right to remain silent."

[18] 353 U.S. at 417.

[19] 353 U.S. at 421, 422. *See also Stewart* v. *United States*, 366 U.S. 1, 7 n. 14 (1961).

[20] 353 U.S. at 422–423.

before the grand jury he was "already considered a potential defendant" and therefore "it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself." [21]

These reasons have even greater validity in the present case: (*a*) while the record does not disclose whether Hale insisted upon his innocence at the time of arrest, it clearly reveals that he steadfastly maintained his innocence throughout the proceedings; (*b*) police interrogation may be viewed as more "secret" than a grand jury proceeding which is conducted on the record and in the presence of the prosecutor and grand jurors. *Miranda's* rules were aimed precisely at dangers presented by the secret nature of police interrogation; [22] (*c*) Hale was more clearly a "potential defendant" than Grunewald since he had been identified by the victim as one of the robbers, and had been arrested by the police on suspicion of the instant offense.

In sum, application of the principles enunciated in *Grunewald* compels a finding that, as a matter of law,[23] there was nothing inconsistent between Hale's silence in interrogation and his alibi at trial. Thus, the basic

[21] 353 U.S. at 423.

[22] *See Miranda*, *supra*, 384 U.S. at 445 ("The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.").

[23] The *Grunewald* Court acknowledged that "the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial court. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control * * *" 353 U.S. at 423–424.

premise required for triggering the *Harris* rationale is absent.[24]

Even if it could be said that appellant's silence at the police station was inconsistent with his testimony at trial, *Harris* would nevertheless be inapplicable in the present circumstances. In *Harris* the accused did not exercise his constitutional right to remain silent, but rather *spoke,* albeit without first being advised of his rights. In the instant case, on the other hand, the accused explicitly availed himself of his right to remain silent. The Supreme Court has proscribed comment by a court or prosecutor on the fact that a defendant did not testify at trial on the ground that such comment "cuts down on the privilege by making its assertion costly." *Griffin* v. *California,* 380 U.S. 609, 614 (1965). The Court, relying upon this analysis, then ruled in *Miranda* that it is "impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." [25] The rationale for this rule was articulated by Justice Black in his *Grunewald* concurrence:

[24] *See Fowle* v. *United States,* 410 F. 2d 48, 51 (9th Cir. 1969) ("Surely * * * [petitioner's] silence was no more contradictory of his later testimony than was the silence of [the petitioner in Grunewald]."); *Johnson* v. *Patterson,* 475 F. 2d 1066 (10th Cir. 1973).

[25] 384 U.S. at 468 n. 37. *See Gillison* v. *United States,* 399 F. 2d 586, 587 (D.C. Cir. 1968) ("The distance between [*Griffin*] and the prosecutor's comments here * * * is infinitesimal."); *Fowle* v. *United States,* 410 F. 2d 48, 51–55 (9th Cir. 1969); *Johnson* v. *Patterson,* 475 F. 2d 1066, 1067–68 (10th Cir. 1973). *See generally Spevak* v. *Klein,* 385 U.S. 511 (1967); *United States ex rel. Macon* v. *Yeager,* 476 F. 2d 613, 616 (3rd Cir. 1973) ("*Griffin* holds broadly that at least in the criminal context, the relevant question is whether the particular *defendant* has been *harmed* by the state's use of the fact that he engaged in constitutionally protected conduct * * *") (emphasis in original).

> [There are] no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution. 353 U.S. at 425–26.

Nothing in *Harris* undercuts this fundamental constitutional principle since *Harris* did not involve assertion of the constitutional right.[26]

Our conclusion that the prosecutor's question was improper is buttressed by the fact it would be grossly

[26] The dissent relies heavily on *Raffel* v. *United States,* 271 U.S. 494 (1926), where the Court held that a defendant who testifies at his second trial, but who did not testify at the first trial, may be impeached by his prior silence when his purpose in testifying is to deny some statements attributed to him by a witness who has offered the same testimony at both trials. In *Grunewald, supra,* the Court explicitly declined to reaffirm *Raffel.* 353 U.S. at 421. Four Justices concurring in *Grunewald* indicated that *Raffel* should be overruled. The rationale of that concurrence provided the framework for the Court's subsequent decision in *Griffin.* Accordingly, there is a serious question whether *Raffel* has any remaining vitality. *See* Note, Use of Silence, 33 Md. L. Rev. 363, 367 n. 21 (1973). *See also Stewart* v. *United States,* 366 U.S. 1 (1961) (cannot attack witness' demeanor by introducing fact that he failed to testify at former trials).

In any event, *Raffel* is clearly distinguishable from the present circumstances because there the petitioner was impeached by his refusal to testify at a former *trial,* whereas in the instant case appellant declined to speak with police interrogators. There are good reasons why a defendant would refuse to speak to the police in a proceeding that is off the record, and at a time when he is without the advice of counsel, and then decide to testify at trial. *See Grunewald, supra.*

unfair to advise an accused simply that he had "a right to remain silent," and then use his silence against him at trial without at the very least having also informed him that if he chooses to exercise his right he may subsequently be impeached by that fact. The Sixth Circuit noted almost fifty years ago that if an accused's silence is to be used against him he "should be told, 'If you say anything, it will be used against you; if you do not say anything, that will be used against you.'"[27] The Supreme Court embraced these principles in *Johnson* v. *United States,* 318 U.S. 189 (1943), where a defendant who testified was allowed to assert his privilege against self-incrimination as to some questions without having been told that the prosecutor would be permitted to comment upon this assertion. The Court ruled that even if it was error to allow petitioner to invoke his privilege, it was nonetheless improper to permit prosecutorial comment because the defendant was thereby "deprive[d] * * * of an intelligent choice between claiming or waiving his privilege."[28]

B.

The government argues that the error was harmless since the trial court interrupted the prosecutor and in-

[27] *McCarthy* v. *United States*, 25 F. 2d 298, 299 (6th Cir. 1928). *See also Johnson* v. *Patterson*, 475 F. 2d 1066 (10th Cir. 1973); *United States* v. *Brinson*, 411 F. 2d 1057 (6th Cir. 1969); *Fowle* v. *United States*, 410 F. 2d 48 (9th Cir. 1969).

[28] 318 U.S. at 198. The Court noted:

"Elementary fairness requires that an accused not be misled on [th]is score. If advised by the court that his claim of privilege though granted would be used against him, he well might never claim it." *Id.* at 197.

This rationale is equally compelling in the face of police interrogation and advice.

formed the jury that Hale "was not required to indicate where the money came from * * * You may disregard it, ladies and gentelemen."[29] To avoid reversal, however, the error, being of constitutional magnitude,[30] must be harmless beyond a reasonable doubt.[31]

The government's case against Hale rests on three limbs: (*1*) the testimony of the complaining witness; (*2*) appellant's flight at the time of arrest; and (*3*) appellant's possession of $158.

(*1*) The testimony of the complaining witness was confused and contradictory. The trial court characterized it as follows:

> [O]ne view * * * with respect to this complainant might be that he has been contradicted to such a point that he wouldn't be believed. Another perfectly fair view * * * is that he is an entirely sincere witness who has a limited intellectual ability, [and] who was in part confused and misled in some of his answers * * *[32]

(*2*) With respect to appellant's flight upon apprehension, he explained that his companion had purchased heroin, and, since he had a prior narcotics conviction, he was afraid. He claimed that his former narcotics conviction arose in the same circumstances; that is, when he was not himself in possession of drugs.

(*3*) In the face of the weak testimony by the complaining witness, and the limited probity of the evi-

[29] Tr. at 259.

[30] *See Gillison* v. *United States*, 399 F. 2d 586, 588 n. 8 (D.C. Cir. 1968).

[31] *Chapman* v. *California*, 386 U.S. 18 (1967).

[32] Tr. at 187.

dence on flight,[33] evidence of the large sum of money found on appellant played a central part in the government's case. Appellant attacked this evidence in two ways: first, by showing that the sum of money found on him was much greater than the amount allegedly stolen; and second, by offering an alibi, corroborated by his wife, explaining his possession of the large sum. In this context the improper question by the prosecutor leading to Hale's admission that he did not offer his alibi to the police was calculated to break a critical point in the defense since it was apparently intended to indicate that the alibi had been fabricated sometime between arrest and trial.

In *Stewart* v. *United States*, 366 U.S. 1 (1961), petitioner, who had been convicted three times—his first two convictions having been reversed by this court [34]—declined to testify at the first two trials, but took the stand at the third "in an apparent effort to bolster [his] contention of insanity [the sole issue in the case]." [35] On cross-examination, after the defendant admitted that he had been "tried on two other occasions," the prosecutor asked: "This is the first time you have gone on the stand, isn't it?" [36] The Court found the question improper and concluded that the error was not harmless. Speaking of a potential cautionary instruction to the jury, such as the one given in this case, the Court said:

> [T]he danger of the situation would have been increased by a cautionary instruction in that

[33] *See generally Bailey* v. *United States*, 416 F. 2d 1110, 1114 & n. 29 (D.C. Cir. 1969); *Miller* v. *United States*, 320 F. 2d 767 (D.C. Cir. 1963).

[34] *Stewart* v. *United States*, 214 F. 2d 879 (D.C. Cir. 1954); *Stewart* v. *United States*, 247 F. 2d 42 (D.C. Cir. 1957).

[35] 366 U.S. at 3.

[36] 366 U.S. at 4.

> such an instruction would have again brought the jury's attention to petitioner's prior failure to testify. 366 U.S. at 10.

Thus, the error in the present case, when considered in light of the evidence against appellant, cannot be deemed harmless beyond a reasonable doubt.[37]

III—Anderson's Claim

Appellant Anderson contends that his constitutional right to remain silent was abridged by Hale's closing argument to the jury:

> All they can do—all people can do is come in and tell you exactly what they did that day. * * * That is all they are required to do. They are not even required to do that, ladies and gentlemen.
>
> And, of course, Mr. Hale took the stand and did just that.[38]

Anderson maintains that this statement urged the jury to draw a negative inference from Anderson's failure to testify. We have studied Hale's closing argument, and find that this statement, by itself,[39] did not "invite an inference of [Anderson's] guilt."

[37] *See, e.g., United States ex rel. Macon* v. *Yeager*, 476 F. 2d 613, 616–617 (3rd Cir. 1973); *Gillison* v. *United States*, 399 F. 2d 586, 588 (D.C. Cir. 1968). *Compare Leake* v. *Cox*, 432 F. 2d 982 (4th Cir. 1970) ("overwhelming evidence of guilt"); *United States* v. *Wick*, 416 F. 2d 61 (7th Cir. 1969) ("overwhelming evidence against the defendant").

[38] Tr. at 294.

[39] Anderson argues that this statement was particularly prejudicial because other parts of Hale's closing argument attempted to place the blame on Anderson while exonerating Hale. Anderson cites several statements in Hale's argument indicating that Arrington had testified before the grand jury that *Hale* had committed certain inculpatory acts, whereas at trial he testified that *Anderson* did these acts. The record,

United States v. *Hines*, 455 F. 2d 1317, 1335–36 (D.C. Cir. 1971) (Bazelon, C.J., dissenting).[40] Indeed, shortly after completion of Hale's closing argument, the court instructed the jury that it "must not draw any inference of guilt against the defendant because he did not testify."[41] In these circumstances, we find no error warranting reversal of Anderson's conviction.

So ordered.

WILKEY, *Circuit Judge* dissenting: The convictions of both defendant Anderson and defendant Hale should be affirmed. I dissent from Chief Judge Bazelon's opinion insofar as it reverses Hale's conviction. In my judgment there was no error, and if the majority have ferreted out a flaw in the justice administered in the District Court, such error was harmless under all reasonable standards.

I. THE ASSERTED PERNICIOUS PASSAGE

The shaky ground on which the majority overturns Hale's conviction concerns alleged infringement of defendant's right to remain silent when questioned by police after arrest. At trial, when the prosecutor was

however, does not support Anderson's claim. When placed in context, it is clear that the statements in Hale's closing argument were aimed solely at convincing the jury that *Arrington* was wholly incredible since he continually changed his story. Thus, Anderson was not harmed. *See DeLuna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962); *United States* v. *Barney*, 371 F. 2d 166 (7th Cir. 1966). *Compare United States* v. *Hines*, 455 F. 2d 1317 (D.C. Cir. 1971), *with id.* at 1335 (Bazelon, C.J., dissenting).

[40] In *Hines*, counsel for one co-defendant argued "you and I, if we were innocent, we would take the stand to try to exonerate ourselves." 455 F. 2d at 1334.

[41] Tr. at 308.

cross-examining Hale, who had elected to testify in his own defense, the following exchange occurred:

> Q. Did they search you?
> A. Yes, they did.
> Q. Did they find some money on you?
> A. Yes, they did.
> Q. Did you *in any way indicate* where that money came from?
> A. No, I didn't.
> Q. Why not?
> A. I didn't feel that *it was necessary* at the time.
> Q. You were advised of your rights, were you not?
> A. Yes.[1]

Directly thereafter District Judge Gesell *sua sponte* gave a cautionary instruction:

> COURT. He is not required to indicate where the money came from. There is no responsibility on his part in regard to that.
> HALE'S COUNSEL. Thank you, your Honor.
> ANDERSON'S COUNSEL. I ask that the question and answer be stricken.
> COURT. I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest.[2]

II. CREDIBILITY OF THE WITNESS-DEFENDANT PLACED IN ISSUE

This cross-examination of the defendant on the witness stand did not violate defendant's Fifth Amend-

[1] Record at 259 (emphasis supplied).

[2] Record at 259–60. In my view the trial judge acted in an excess of caution in telling the jury, "You may disregard it." A more correct caution would have been, "You may only consider the question and answer as it may bear, if in your judgment it does bear, on Mr. Hale's credibility."

ment right against compelled self-incrimination.[3] Nor did it violate the right to silence expressed in *Miranda* v. *Arizona*, that:

> it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.[4]

The majority rely on this quotation from *Miranda*, a part of *Miranda* which, it should be noted initially, is a footnoted dictum. In *Miranda* the defendant talked without a proper or timely warning, which was admittedly given here. In *Miranda* apparently the defendant never took the stand; here Hale took the stand to tell his complete story.

The *Miranda* footnote dictum applies, if it applies at all, to a situation in which the defendant "stood *mute*, or claimed his *privilege* in the face of *accusation*." There is no testimony here that Hale ever claimed any privilege; there is no testimony[5] by either Hale

[3] The Fifth Amendment provides that "No person * * * shall be compelled in any criminal case to be a witness against himself."

[4] 384 U.S. 436, 468 n. 37 (1966).

[5] In a conference at the bench the following exchange occurred:

"COURT. Do you have any evidence that he gave a contrary statement to the police?

"PROSECUTOR. They asked him, 'Where did you get the money?' He couldn't account for it.

"COURT. What did he say?

"PROSECUTOR. He wouldn't say anything. He couldn't account for it. They asked him whether he was working or wasn't working. He wouldn't indicate.

"COURT. That question was highly improper. I tried to correct it. I think I have corrected it."

Record at 261–62. This appears to be the only exchange in the record which indicates the nature of the police interrogation of defendant after his arrest. It is not first-hand admissible testimony, nor does it purport to be a complete account of the dialogue between police and defendant. The conclusion that some dialogue took place is inescapable.

or the police officers or any witness as to Hale standing mute; nor is there any testimony of any police accusation.

Regretfully, I must point out that the dialogue—in quotes—my colleagues cite in the text at note 7 and in note 12, as testimony as to what defendant Hale *said* in answer to police questioning, is *not evidence at all*. Hale never testified to this, no police witness testified to this, the jury never heard any such words. The "dialogue" is lifted from a bench conference at which the Assistant U.S. Attorney purported to give his belief as to what occurred at the police station. The jury never would have been permitted to receive any such hearsay from the prosecutor, who of course was never there. My colleagues thus reverse this case by relying heavily upon unsworn hearsay "testimony" never heard by the jury.

The record in Hale's case simply does *not* support the action of the majority in reversing Hale's conviction, even if the *Miranda* footnote dictum be taken as good law applicable to Hale's case *before trial*.

As to Hale's position *at trial*, in contrast to Miranda, Hale took the stand. When he did, he waived his privilege against self-incrimination; he placed his credibility in issue just as any other witness does. There can be no question about this. For if the credibility of the defendant in some way is subject to a more *limited* challenge than that of other witnesses, then logically the jury should be so instructed. A defendant should not be able to offer testimony that is subject to less challenge than that of any other wit-

ness, without the jury being instructed that this is so and that they can evaluate the testimony accordingly. And no one suggests here that this be done. So we must assume that evidence of statements made, of explanations not made, and when made, if relevant to the witness Hale's credibility on the testimony he chooses to give on the stand, is admissible.

In reference to the $150 found on his person at the time of arrest, Hale told the jury on direct examination that he had obtained the $150 from his wife in order to purchase money orders. He thus assuredly did not stand mute or claim any privilege at trial. He put into evidence, for the jury to believe or disbelieve, his explanation of where he got the $150. After such testimony, as part of the usual and proper technique for testing any witness' credibility, the most obvious logical inquiry was whether this or any other explanation had been given previously. This the prosecutor proceeded to do, and such was thoroughly permissible.

It is clear that under *Harris* v. *New York*,[6] if Hale had given a contrary explanation of the source of his money to the police, such an explanation would be admissible to impeach his credibility, assuming that his explanation was voluntary.[7] Chief Justice Burger wrote for the Court that:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than

[6] 401 U.S. 222 (1971).

[7] *Harris* merely requires that the defendant's statement be voluntary; the *Miranda* warnings need not be given.

> utilize the traditional truth-testing devices of the adversary process.[8]

In the case at bar, Hale simply gave the police no reason for the presence of a large sum of money found on his person. The failure previously to offer an explanation conceivably carriers less of an adverse inference as to the witness' credibility, but the logical relationship of either a different or no previous explanation to an explanation offered for the first time at trial is exactly the same. Unless the jury is *obliged* to accept the testimony of a defendant under *standards* entirely *different* from that of any other witness, then this failure to explain should be made known to the jury to assist in evaluating the witness-defendant's testimony, with the overall objective of arriving at the truth.

The Supreme Court has not considered this issue since it decided in *Harris* that prior inconsistent statements could be introduced. However, the Court did consider the issue in 1926 in *Raffel* v. *United States*.[9] There the Court found it permissible to require the defendant who took the stand at his second trial to disclose that he had not testified in the first trial (where the jury failed to reach a verdict). The Court stated,

> The immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, *he does so as any other witness*, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. He may be examined for the purpose of impeaching his credibility. His *failure to deny or explain evidence of incriminating cir-*

[8] 401 U.S. at 225 (citations omitted).

[9] 271 U.S. 494 (1926).

> *cumstances* of which he may have knowledge, *may be the basis of adverse inference*, and the jury may be so instructed. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.[10]

The Court concluded that,

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, *as does any other witness.*[11]

The Supreme Court reconsidered *Raffel* in a 1957 case, *Grunewald* v. *United States*,[12] where it held *Raffel* not controlling in the circumstances of the later case. In *Grunewald* the prosecution brought out in cross-examination of the defendant that the latter had pleaded his Fifth Amendment privilege before the grand jury when he was asked questions identical to those he subsequently answered at trial. In the charge to the jury, the trial judge stated that defendant's prior assertion of privilege could be used only to reflect on his credibility and could not provide an inference as to guilt or innocence. The Supreme Court felt that it was necessary to determine whether, given the particular circumstances of the case "the cross-examination should have been excluded because its probative value on the issue of [defendant's] credibility was so negligible as to be far *outweighed* by its possible impermissible impact on the jury."[13] Exercising its supervisory power over the administration of federal criminal justice, the Court concluded that defendant's prior silence was not inconsistent with his later statement on the stand and that there was a serious likelihood that the jury might equate assertion of the privilege with guilt. Consequently, the Court required a new trial for the defendant.

[10] *Id.* at 496–97 (citations omitted) (emphasis supplied).
[11] *Id.* at 499 (emphasis supplied).
[12] 353 U.S. 391 (1957).
[13] *Id.* at 420 (emphasis supplied).

Grunewald is distinct from Hale's case in several ways. That no inference can or should be drawn from the assertion of the Fifth Amendment privilege against self-incrimination has long been thought necessary to preserve the vitality of the privilege itself. The 1957 *Grunewald* decision came at a time when the use (or abuse) of the privilege was under severe attack, and there existed an undoubted likelihood that the average juror would equate "taking the Fifth" to a confession of guilt. Whatever the logical relevance of this to any later explanation offered by a defendant, the real danger of prejudice would outweigh any relevance. The same cannot be said of Hale's situation. Nothing was said, either in question or answer, about a fear of incrimination. Hale was simply asked, "Did you in any way indicate where that money came from?" He answered equally simply, "No, I didn't. * * * I didn't feel it was necessary at the time."

My two colleagues believe that the jury could draw such an unfair and prejudicial inference from this that, on the extended authority of a footnoted dictum in *Miranda*, the entire trial goes for nought and the conviction *must* be set aside. To me, especially in view of the trial judge's immediate corrective instruction, which to my mind went too far in restoring the proper balance,[14] this result is an incredible perversion of the judicial process.

[14] *See* n. 2, *supra*.

The issue raised here is governed by *Raffel,* not *Grunewald.* The issue in *Raffel* was squarely focused by a certified question: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?" [15] In answer to which, in Mr. Justice Harlan's opinion for the Court in *Grunewald,* "[t]his Court held, in effect, that when a criminal defendant takes the stand, he waives his privilege completely and becomes subject to cross-examination impeaching his credibility just like any other witness." [16] I submit this is exactly what Hale did here: in his dialogue with the police he chose not to tell them where he got the money, and this omission, like Raffel's choice not to testify in his first trial, can properly be brought out before the jury. There was no problem of a plea of privilege by Hale sought to be used against him, as in *Grunewald.*

Furthermore, the four concurring Justices in *Grunewald* interpreted and disagreed with the Court's opinion: "I do not, like the Court, rest my conclusion on the special circumstances of this case." [17] So *Grunewald* is a case resting on "special circumstances," and since Justice Harlan and the Court resisted the entreaties of the four to overrule *Raffel,* [18] it is the Supreme Court's decision in *Raffel,* not in *Grunewald,* which governs Hale's case here.

I am sustained in my view, not only by what I consider the proper analysis of *Harris, Miranda, Grunewald,* and *Raffel,* but also by recent decisions in other circuits.

[15] 271 U.S. at 496.
[16] 353 U.S. at 420.
[17] *Id.* at 425 (Black, J., concurring).
[18] *Id.* at 426 (Black, J., concurring).

Although the Supreme Court has not reconsidered the permissibility of cross-examination by the prosecution of a defendant concerning his earlier silence, hence such cross-examination is still clearly authorized by *Raffel,* several circuits have considered the question in light of *Harris* v. *New York.* The Fifth Circuit, in *United States* v. *Ramirez,* [19] found such cross-examination proper. The defendant in that case testified at trial that he had been coerced into selling heroin by threats of harm from strangers. On cross-examination, he admitted that he had never told the police this fact, and in the closing argument the prosecutor urged that this was not the way a truthful man would act. No objection was raised at trial. On appeal, the Fifth Circuit held that *Harris* mandates the conclusion that:

> Once [defendant] elected to testify and assert the defense of coercion *he became subject to the "traditional truth-testing devices of the adversary process,"* including the right of the prosecution to show *his prior inconsistent act of remaining silent at the time of his arrest.* [20]

The only difference between the case at bar and *Ramirez* is that the District Judge here *sua sponte* gave cautionary instructions informing the jury that defendant had no obligation to tell the police where he had obtained the money. If there was error harmful to Hale, there was error harmful to Ramirez—except that Hale had the benefit of an immediate curative instruction.

The Third Circuit also adopted the *Ramirez* approach in *United States ex rel. Burt* v. *State of New*

[19] 441 F. 2d 950 (5th Cir.), *cert denied,* 404 U.S. 869 (1971).
[20] *Id.* at 954 (emphasis supplied).

Jersey.[21] There, defendant took the stand and explained that a shooting was accidental rather than intentional. On cross-examination, when asked why he had not told anyone what had happened, he had no explanation. The prosecution sought to attack his credibility on the theory that someone responsible for an accidental injury would attempt to obtain help for the injured.[22] The Third Circuit held the cross-examination permissible. It referred to *Ramirez* with approval.

The concurring opinion of Judge Rosenn in *Burt,* which was joined by one of the other two panel members and thus becomes a majority opinion, was even more explicit:

> If the shooting was accidental as claimed by Burt, his silence both before he was a suspect and after was inconsistent with his at-trial testimony that the shooting was accidental. Such inconsistency, *Harris* holds, must be subject to the truth-seeking process of cross-examination. I perceive no difference between impeachment by prior inconsistent statements made in the absence of a *Miranda* warning and impeachment by prior silence inconsistent with trial testimony which justifies not applying the *Harris* rationale in the present case.[23]

Traditionally in our adversary system cross-examination is used to probe the credibility of direct testi-

[21] 475 F. 2d 234 (3rd Cir. 1973).

[22] *Burt* involved a samewhat odd factual situation, in that on the same evening as the shooting, the defendant was arrested for breaking and entering a store, which offense was unconnected with the shooting death. Defendant's failure to comment on the "accidental" shooting to the police was urged by the prosecutor to show the unreliability of defendant's testimony at trial. The defendant had not been questioned by the police concerning the shooting.

[23] 475 F. 2d at 237–38.

mony. Without such cross-examination, perjury is likely to go undiscovered. When a defendant takes the stand, his testimony may be examined in the light of his past voluntary statements. Likewise, his past silence may be introduced, when it may be inconsistent with the story he tells on the stand.[24] And note particularly, what we are dealing with in Hale's case are entirely voluntary acts, either of statement or non-statement. There is no suggestion of a *Miranda* situation.

Griffin v. *California*[25] established that if the defendant does not take the stand at trial, neither the prosecutor nor the judge may comment on his silence. However, once the defendant does take the stand, I believe his credibility may be tested not only by prior inconsistent statements as mandated by *Harris,* but also by prior inconsistent silence.

A contrary view was taken by the majority in a Tenth Circuit case, *Johnson* v. *Patterson.*[26] They believed that *Harris* was distinguishable from a case concerning a defendant's silence at the time of arrest, for they thought that the latter was:

> not an inconsistent or contradictory statement. Silence at the time of arrest is simply the exer-

[24] As Judge Rosenn wrote, "If inconsistencies cannot be demonstrated to a jury, the truth-seeking process is strait-jacketed. The defendant, of course, is free to explain away seeming inconsistencies. The adversarial system requires that the jury, as triers of fact, make the final determination of which testimony and conduct to believe." *Id.* at 238.

[25] 380 U.S. 609 (1965).

[26] 475 F. 2d 1066 (10th Cir. 1973), *cert. denied,* 42 U.S.L.W. 3199. It should be noted that in *Johnson,* instead of the trial judge telling the jury to disregard the question and answer concerning the defendant's previous silence, there was no cautionary instruction and the prosecutor was allowed to refer in closing argument to defendant's silence compared to his explanation at trial.

> cise of a constitutional right that all persons must enjoy without qualification. It would indeed be irregular and anomalous to warn an accused that he has the right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him.[27]

However, I agree with Judge Breitenstein's dissent that once having waived his privilege against compelled self-incrimination by testifying at trial, the defendant may not reassert his privilege when the questioning becomes tough.[28] The waiver is not partial.[29] Once the defendant has opened up a subject area on direct examination, the principle that a witness should testify truthfully prevails; cross-examination of the witness-defendant to determine if he made similar statements previously is logically necessary in evaluting his truth or credibility. As Chief Justice (then Circuit Judge) Burger remarked in *Tate* v. *United States,* "At best the theory that judicial suppression of truth has a beneficial effect on the administration of justice is unproved and perhaps unprovable."[30]

It is true that the prior silence of the witness-defendant must be inconsistent with his later statement at trial, for otherwise the prior silence would not be capable of impeaching his credibility. But in the case at bar, the failure to explain to the police the source of the money does cast doubt upon the later explanation that defendant's wife had given him the money. The jury should be allowed to evaluate the witness-defendant's testimony at trial in light of his

[27] *Id.* at 1068 (citations omitted). This view was reiterated by the same Circuit in *Deats* v. *Rodriguez*, 477 F. 2d 1023 (10th Cir. 1973).

[28] 475 F. 2d at 1068.

[29] *See Raffel* v. *United States*, 271 U.S. 494 (1926).

[30] 109 U.S. App. D.C. 13, 17, 283 F. 2d 377, 381 (1960).

past silence, which is arguably inconsistent with an innocent explanation.

This view is similar to that of the British Criminal Law Revision Committee. In a report presented to Parliament in 1972, the Committee, which had been established by the Home Secretary, recommended that it should be "permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defence which he puts forward at his trial."[31] The suspect would have a right to remain silent; but if he did so, that fact might be introduced at trial. It would be for the court or jury to determine if an

[31] Criminal Law Revision Committee, Eleventh Report, Evidence (General) 16 (1972). Prior law generally did not permit comment on defendant's prior silence. *See id.* at 16–17; K. Cross, Evidence 180 (1967). It is interesting to note that the law Revision Committee Draft Bill makes the change in Clause 1 of Part I:

"1.—(i) Where in any proceedings against a person for an offence evidence is given that the accused—

"(a) at any time before he was charged with the offence, on being questioned by a police officer trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

"(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

"being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, the court, in determining whether to commit the accused for trial or whether there is a case to answer, and the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material."

Criminal Law Revision Committee Report at 172.

adverse inference should be drawn from the defendant's prior omission.[32]

[32] Criminal Law Revision Committee Report at 21. Even if an improper inference is permitted by the trial judge's "misdirection," it may be "harmless error" under the present British standard. Compare Hale's case with a recent British criminal appeal, discussed by the Committee in regard to the effect of the proposed change:

"30. In Our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defense which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice. * * * [In *Sullivan* (1967), 51 Cr. App. R. 102.] the accused, who was convicted of smuggling watches from Switzerland, had refused to answer questions by Customs officers. The judge, in the coure of his summing up, had referred to the refusal and gone on:

"'Of course bear in mind that he was fully entitled to refuse to answer questions, he has an absolute right to do just that, and it is not to be held against him that he did that. But you might well think that if a man is innocent he would be anxious to answer questions. Now, members of the jury, that is what it really amounts to.'

"The Court of Appeal said with reference to this:

"'It seems pretty plain that all the members of that jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them. The appellant was not obliged to answer, but how odd, if he was innocent, that he should not have been anxious to tell the Customs officer why he had been to Geneva, whether he put the watches in the bag, and so on.'

"Then, after referring to the authorities, the judgment went on to say that sometimes comment on the accused's silence was

Of course the most recent British thought on this question is persuasive at best. But then, the British are not an uncivilized people, and they have had some years of experience in administering a system of justice which other nations view with a bit of envy.

III. Error Harmless Beyond a Reasonable Doubt

Chief Judge Bazelon and Judge Wisdom reverse this conviction on *four lines* of a 326-page transcript:

> Q. Did you *in any way indicate* where that money came from?
> A. No, I didn't.
> Q. Why not?
> A. I didn't feel that *it was necessary* at the time.

Assuming this was error, even *uncorrected* error, I would be loath to reverse a conviction which appears solidly founded.[33] But the alert trial judge here im-

unfair but that there was no unfairness in this case. It then continued:

"'The line dividing what may be said and what may not be said is a very fine one, and it is perhaps doubtful whether in a case like the present it would be even perceptible to the members of any ordinary jury.'

"The court held that they were compelled, in the existing state of the law, to hold that the judge's comment was a misdirection, but they dismissed the appeal under the proviso to s. 4(1) of the Criminal Appeal Act 1907 (c. 23) on the ground that 'no possible miscarriage of justice occurred.'"

Id. at 17–18 (citations omitted). So the present British rule, with the factor of "harmless error" properly considered, would sustain Hale's conviction, as discussed in Part III of this opinion.

[33] Any time a victim reports himself robbed, describes generally his assailants, sets out with the police in immediate search of them, spots two men walking some distance away,

mediately *sua sponte* gave a corrective instruction, removing from the jury's mind any inference to be drawn from Hale's failure *to offer* an explanation for the money at the time of his arrest.

It should be observed that both the prosecutor's questions and Hale's replies were couched in terms which implied that Hale had simply failed to volunteer an explanation; there was nothing suggesting that Hale had been asked a direct question by the police and had refused to answer (whether this actually occurred is thus immaterial, because the jury received no such implication). Thus the effect of the two improper questions, if they were such, was easily subject to being corrected by the trial court's cautionary instruction, which, in my judgment it was. In fact, the judge's cautionary instruction was so quick and emphatic that it may well have knocked out any inference unfavorable to the defendant Hale which the prosecution had hoped to draw from the mere fact of Hale's possession of the $150 immediately after the robbery.

The standard of harmless error beyond a reasonable doubt is well known from *Chapman* v. *California,*[34] which requires that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reason-

excitedly yells that one of them was *one* of the robbers, unerringly identifies *one* of the pair (but not the other) as one of the perpetrators of the crime, the identified accused having on his person a comparatively large sum of money for the possession of which he offers no explanation whatever (not even as wages for current employment), all of this adds up to about as solid evidence in ordinary street crime as the courts ever get. A jury of our local citizens thought so. That the victim later became mixed up on irrelevant details is insignificant when compared with his certainty of identification of Hale immediately after the crime.

[34] 386 U.S. 18, 24 (1967).

able doubt." This standard was further elaborated in *Anderson* v. *Nelson*: "comment on a defendant's failure to testify [at trial] cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal."[35] In the case at bar, the comment on the defendant's silence *before the police* was not extensive; no inference of guilt was stressed to the jury; and a cautionary instruction was given.[36]

If those four lines in Hale's trial, followed immediately by a corrective instruction, do not constitute harmless error beyond a reasonable doubt, have my two colleagues left anything of the Supreme Court's *Chapman* standard in this Circuit?

I would affirm Hale's conviction.

[35] 390 U.S. 523, 523–24 (1968).

[36] *See also Donnelly* v. *DeChristoforo*, 42 U.S.L.W. 4682 (U.S. May 14, 1974), where the Supreme Court again distinguished between "ordinary trial error" and "egregious misconduct" amounting to a denial of constitutional due process.

APPENDIX B

[United States Court of Appeals for the District of Columbia Circuit, filed May 21, 1974; Hugh E. Kline, Clerk]

United States Court of Appeals for the
District of Columbia Circuit

September Term, 1973, Criminal Action 2348–71

No. 72–1848

UNITED STATES OF AMERICA

v.

FLEMMING ANDERSON, APPELLANT

No. 72–2066

UNITED STATES OF AMERICA

v.

WILLIAM G. HALE, APPELLANT

Appeals from the United States District Court for the District of Columbia

Before: BAZELON, *Chief Judge,* WISDOM,* *United States Circuit Judge for the Fifth Circuit* and WILKEY, *Circuit Judge.*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for

*Sitting by designation pursuant to 28 U.S.C. § 291(a).

the District of Columbia and were argued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

Ordered and adjudged by this Court that the conviction of appellant William G. Hale is hereby reversed and it is

Further ordered and adjudged by this Court that the conviction of appellant Flemming Anderson is hereby affirmed.

Per Curiam.

For the Court.

HUGH E. KLINE,
Clerk.

Date: May 21, 1974

Opinion for the Court filed by Chief Judge Bazelon.

Dissenting opinion filed by Circuit Judge Wilkey.

APPENDIX C

United States Court of Appeals for the
District of Columbia Circuit

September Term, 1973

Criminal 1319–71

[United States Court of Appeals for the District of Columbia Circuit, Filed Aug. 1, 1974; Hugh E. Kline, Clerk]

No. 72–2066

UNITED STATES OF AMERICA

v.

WILLIAM G. HALE, APPELLANT

Before: BAZELON, *Chief Judge;* WISDOM,* *U.S. Circuit Judge for the Fifth Circuit* and WILKEY, *Circuit Judge.*

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

*Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

APPENDIX D

United States Court of Appeals for the
District of Columbia Circuit

September Term, 1973

Criminal 1319–71

[United States Court of Appeals for the District of Columbia Circuit, Filed Aug. 1, 1974; Hugh E. Kline, Clerk]

No. 72–2066

UNITED STATES OF AMERICA

v.

WILLIAM G. HALE, APPELLANT

Before: BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

On consideration of appellee's suggestion for rehearing *en banc,*

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

Statement of Circuit Judges Tamm, MacKinnon, Robb and Wilkey as to Why They Would Grant Rehearing *En Banc:*

As to the existence of any error in the trial, the court's majority opinion is contrary to the Supreme Court's decision in *Raffell* v. *United States,* 271 U.S. 494 (1926), a decision which the Supreme Court has specifically declined to overrule. The majority opinion is also contrary to recent decisions of the Third and Fifth Circuits, although in agreement with a two-to-one decision of the Tenth Circuit, as cited in Judge Wilkey's dissent.

As to any prejudice to the defendant Hale, even if any error occurred, it was certainly cured by the trial court's prompt instruction and was harmless beyond a reasonable doubt. The majority opinion here attempts to abolish in this Circuit the Supreme Court standard of harmless error laid down in *Chapman* v. *California,* 386 U.S. 18 (1967).

On both grounds the panel majority decision merits review by our full court.

U.S. GOVERNMENT PRINTING OFFICE: 1976

Supreme Court, U. S.
FILED
JAN 23 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA,

Petitioner

—v.—

WILLIAM G. HALE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 30, 1974

CERTIORARI GRANTED DECEMBER 9, 1974

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA,
Petitioner

—v.—

WILLIAM G. HALE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1971 Jul 15	Presentment and indictment (1 Count) BAR
1971 Sept 9	ARR: PNG; Pretrial set for Oct. 4, 1971 at 4:00; Bond. GESELL, J. Rep.— P. Harper M. Zwerling, Atty (for P. Chernoff)
1971 Sept 15	Motion of deft. for pre-trial discovery & inspection & for disclosure of evidence favorable to deft; attachment.
1971 Oct 4	Pretrial: Further pretrial is set for Nov. 9, 1971 at 4:00 P.M., Bond. GESELL, J., H. KAITZ, Rep. M. Zwerling, Atty.
1971 Nov 9	Pretrial (Trial is set for 2-9-72 at 2 P.M.); Bond. GESELL, J., Rep-Maher/Watson M. Zwerling, Atty
1971 Dec 15	Govt's Mo to revoke Per Rec or Modify terms & conds. of release.
1972 Feb 3	Deft Hale's Opposition to Joinder of Defts. P/A
	Mo. for issuance of subpoena—GRANTED—GESELL, J
1972 Feb 8	Mo. for issuance of subpoena, GRANTED. GESELL, J.
1972 Feb 16	Defts request for voir dire questions; Trial memo of deft.
1972 Feb 16	Cases 1319-71 and 2348-71 consolidated for trial. Case called for trial; 12 jurors and 2 alts. sworn. Mo. of deft. Hale for mistrial heard and GRANTED (witness ill); deft. Anderson waives his rights to a to a [sic] speedy trial; jurors discharged. Additional conditions of release imposed as to each deft. Deft. Hale remanded (in jail in another case); Deft. Anderson, Bond.

DATE	PROCEEDINGS
	GESELL, J. Rep. I. Watson M. Zwerling, atty. #1; E.J. Mendard., Atty., #2
1972 Jun 15	Motion of deft. for a continuance heard and DENIED. Case called for trial. Twelve (12) jurors and 1 alt. sworn; respited until 6-16-72 at 9:30 a.m. GESELL, J. Rep: I. Watson F. Weisberg, E. Menard, Attys.
1972 Jun 16	Trial resumed; same jurors & alt.; alt. juror discharged; Jury retires & begins deliberations; VERDICT: deft GUILTY as charged (Robbery); Note from jury filed. Jury discharged; deft. committed; commitment issued; referred. Proposed jury instructions 1 thru 4 of Deft. Hale, filed.
	GESELL, J Rep-Harper Frederick Weisberg, atty
1972 Oct 4	SENTENCE: Imposition of sentence suspended. Probation 3 years with conditions that deft. remain in family counselling and narcotic assistance programs as directed by the Probation Officer of this Court. GESELL, J. Rep; I. Watson F. Weisberg, Atty.
1972 Oct 5	JUDGMENT & PROBATION OF 10-4-72
1972 Oct 13	Notice of appeal from Judgment and imposition of sentence entered on Oct. 4, 1972.
1972 Nov 9	Record on Appeal delivered to USCA; In Forma Pauperis (Clerk's fee $2.50 w/c) Receipt from USCA for Original Record.
1972 Nov 9	Certified copy of ORDER USCA dated 11-8-72 appointing Sherman Cohn, Georgetown U Law Center & directing Clerk of District Court to transmit the record as promptly after filing of transcripts as business of office permits. Certified copy of ORDER USCA dated 11-8-72 consolidating 72-1848 & 72-2066 for all purposes.

DATE	PROCEEDINGS
1973 Jan 17	Certified copy of Order USCA dated 1-16-73 appointing Larry J. Ritchie as co-counsel.
1974 Aug 6	CERTIFIED copy of Order USCA dated 8-1-74 denying rehearing.
	CERTIFIED copy of Order USCA dated 8-1-74 denying suggestion for rehearing *en banc*.
1974 Aug 12	CERTIFIED copy of Judgment USCA dated 5-21-74 reversing the Judgment of the District Court. Opinion filed.
1974 Sept 10	Order vacating sentence imposed 10-4-72. (N) GESELL, J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Number 2348-71

UNITED STATES OF AMERICA

vs.

FLEMING ANDERSON, DEFENDANT

Washington, D.C.
June 16, 1972

TRANSCRIPT OF PROCEEDINGS

VOLUME: II
PAGES: 151-326

PHYLLIS P. HARPER
OFFICIAL REPORTER
U. S. COURT HOUSE
WASHINGTON, D. C.

[259]

* * * *

[BY MR. DUGAN]:

Q When did they inform you of the charges?
A When I was at the precinct.
Q Did they search you?
A Yes, they did.
Q Did they find some money on you?
A Yes, they did.
Q Did you in any way indicate where that money came from?
A No, I didn't.
Q Why not?
A I didn't feel that it was necessary at the time.
Q You were advised of your rights, were you not?
A Yes.

THE COURT: He is not required to indicate where the money came from. There is no responsibility on his part in regard to that.

MR. WEISBERG: Thank you, your Honor.

MR. MENARD: I ask that the question and answer be stricken.

THE COURT: I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give [260] any explanation whatsoever at the time of his arrest.

BY MR. DUGAN: If he was asked the question—

THE COURT: I have ruled, sir.

MR. DUGAN: All right, your Honor. Fine.

* * * *

[261]

* * * *

[MR. WEISBERG]: Secondly, I think questioning into whether or not he explained where the money came from was highly improper as the Court pointed out. I am not at all sure that an instruction to the jury could cure that.

THE COURT: Do you have any evidence that he gave [262] a contrary statement to the police.

MR. DUGAN: They asked him, "Where did you get the money?" He couldn't account for it.

THE COURT: What did he say?

MR. DUGAN: He wouldn't say anything. He couldn't account for it. They asked him whether he was working or wasn't working. He wouldn't indicate.

THE COURT: That question was highly improper. I tried to correct it. I think I have corrected it.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 74-364

UNITED STATES, PETITIONER

v.

WILLIAM G. HALE

ORDER ALLOWING CERTIORARI. Filed December 9, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 566271 66

Supreme Court, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

No. 74-364

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent predicates his opposition to the petition in this case on the ground that the ruling of the court of appeals should be viewed as one of local District of Columbia evidentiary law not suitable for review by this Court. Contrary to respondent's contention, however, the court of appeals clearly based its holding in the instant case solely upon the Fifth Amendment ground that "[t]he prosecution may not * * * use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda* v. *Arizona*, 384 U.S. 436, 468, n. 37. The court's finding that "there was nothing inconsistent between Hale's silence in interrogation and his alibi at trial" (Pet. App. 9A) was made in order to distinguish *Harris* v. *New York*, 401 U.S. 222, which held that a defendant could be impeached by prior inconsistent utterances made at the time of arrest even before the defendant was adequately apprised of his Fifth Amendment rights.

The court of appeals never suggested that it even could—much less that it did here—dispose of this case on "local evidentiary principles."[1] In fact, the court's disposition of the government's harmless error contention makes clear that its ruling was based on federal constitutional grounds. Had the case been disposed of upon "local evidentiary principles," as respondent suggests, the trial court's cautionary instruction immediately following the prosecutor's question might have vitiated any error. The court below, however, refused to find the error harmless, since "the error, *being of constitutional magnitude,* must be harmless beyond a reasonable doubt [citing *Chapman* v. *California*, 386 U.S. 18]" (Pet. App. 13A; emphasis supplied).

Respondent contends, in effect, that this Court should not review constitutional decisions of the highest court of a State, including the United States Court of Appeals for the District of Columbia Circuit sitting as the highest court of the District, whenever the possibility exists that such decisions could have been based upon local law—regardless of the actual or stated basis for the decision. This would, however, necessitate that this Court engage in unguided speculation about the substance of local law. In the instant case, for example, respondent merely hypothesizes that "local evidentiary principles" could have been dispositive, although respondent admits that "the District of Columbia has not adopted the 'per se' rule in the tacit admissions area" (Brief in Opposition at 8).

---

[1]Indeed, as this Court acknowledged in *Grunewald* v. *United States*, 353 U.S. 391, 423-424 (on which the court below partly relied and to which respondent refers):

> [T]he question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control * * *.

An "adequate state ground" for a decision exists only when it appears that reversal of the state court's ruling on the federal constitutional issue would not alter its judgment, because the court also relied upon an independent non-federal ground that is sufficient to support its judgment. However, when a state court's decision discusses only a federal question and its judgment is rested on that ground, this Court will not decline review on the basis of speculation regarding an asserted state ground. See, *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 375-376; Stern and Grossman, *Supreme Court Practice* 137-138 (4th ed.).

Since respondent advances no other ground for denial of our petition, we suggest that respondent has in effect conceded that the constitutional issues discussed and ruled upon by the court of appeals, about which the circuits are in sharp conflict, merit review by this Court.

For the reasons stated in our petition and this reply memorandum, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11

Supreme Court, U. S.
FILED
FEB 11 1975
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No. 74-364

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
ANDREW L. FREY,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 498 F. 2d 1038.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on May 21, 1974, and the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* on August 1, 1974 (Pet. Apps. C and D). On August 26, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 30, 1974, on which date the government's petition was filed. The

petition was granted on December 9, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, respondent was found guilty of robbery, in violation of 22 D.C. Code 2901.[1] Imposition of sentence was suspended, and he was placed on probation for three years. On appeal, the court of appeals reversed respondent's conviction (498 F. 2d 1038; Pet. App. A).

1. The government's case rested largely on the testimony of Lonnie Arrington, the complaining witness, who testified that respondent was one of five men who robbed him of approximately $96 (Tr. 25–30).[2] Dur-

[1] Respondent's co-defendant, Flemming Anderson, was indicted on February 10, 1972. Both cases were consolidated for trial.

[2] Arrington conceded on cross-examination that he had originally told the police that the robbers had taken $65. He explained that this was an estimate given shortly after the robbery. After he had an opportunity to discuss the day's purchases with his wife, however, he re-estimated his loss to be about $96, and he testified to that effect before the grand jury (Tr. 55–56).

ing the course of the robbery, Arrington thought he saw the person who took his roll of money pass it all to respondent (Tr. 36). Soon after the robbery occurred, as Arrington waited with a police officer for a scout car to take him through the area to search for the robbers (Tr. 38–39), he spotted respondent walking with another man (Tr. 39, 41, 73) and recognized respondent as one of the men who had just robbed him (Tr. 39). When, in response to Arrington's identification, the officer approached respondent and his companion, respondent fled (Tr. 39–40). After a short chase, he was apprehended a few blocks away and arrested.

The record indicates that respondent was then taken to the police station and informed of his rights in accordance with *Miranda* v. *Arizona,* 384 U.S. 436, including his right to remain silent (Tr. 259). He was then searched and found to have $123 in his pants pocket (Tr. 112–113). Respondent offered no explanation of this suspicious circumstance when questioned by the police regarding his possession of the money (App. 5).[3]

2. At trial, respondent's estranged wife testified that she had received a $180 welfare check on the day of

[3] The fact that the police specifically *asked* respondent to explain his possession of the money found on his person was revealed by the prosecutor at a bench conference following cross-examination in which respondent had already admitted that he had offered no such explanation (App. 5). Had the prosecutor been permitted to continue the line of questioning, therefore, he would have had an opportunity to elicit the fact that no explanation had been proffered despite specific police inquiry.

the robbery (Tr. 190–193) and, after cashing it, had given respondent about $150 of the total with which to purchase some money orders (Tr. 194, 196–197). Respondent then testified on his own behalf and provided the same explanation for his possession of the money—that his wife had received her welfare check that day and had given him about $150 so that he could purchase some money orders for her (Tr. 217–219). Subsequently, on his way to obtain the money orders, he encountered a friend (Tr. 226). Shortly thereafter, as respondent and his friend walked near the police station, several officers approached and attempted to talk to him. Because respondent's friend had narcotics in his possession, respondent fled from the police, fearing that he would be implicated (Tr. 227).

3. In an effort to impeach respondent's testimony, the prosecutor led respondent on cross-examination to admit that he had not explained to the police at the time of his arrest the source of the money found on his person (App. 4):

> Q. Did you in any way indicate [to the police] where that money came from?
>
> A. No, I didn't.
>
> Q. Why not?
>
> A. I didn't feel that it was necessary at the time.
>
> Q. You were advised of your rights, were you not?
>
> A. Yes.

Immediately following this exchange, the district court cautioned the jury that the questioning was improper and that they should disregard it. The court stated (Pet. App. A, p. 17A; App. 5):[4]

> He is not required to indicate where the money came from. There is no responsibility on his part in regard to that. * * * I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest.

4. In a 2–1 decision, the court of appeals ruled that this cross-examination was improper and required a new trial. The majority reasoned that *Griffin* v. *California,* 380 U.S. 609, barring comment to the jury upon a defendant's failure to testify at trial, similarly barred disclosure of a defendant's assertion of his Fifth Amendment privilege during police interrogation. Moreover, since respondent was told that he had a right to remain silent during interrogation, his failure to explain to the police the source of the money found on his person was considered to be not inconsistent with his subsequent trial testimony. The majority relied in this regard upon *Grunewald* v. *United States,* 353 U.S. 391, in which this Court prohibited

[4] The majority in the court of appeals rejected the notion that this caution to the jury overcame the effect of the impropriety it found in the prosecutor's questions (Pet. App. A, p. 13A). We, of course, disagree with the statement of the district court and the conclusion of the court of appeals that the questioning was improper. In any event, we do not rely here on any argument that the district court's caution to the jury was sufficient to obviate the error, if there was error. See note 5, *infra.* But see *Egger* v. *United States,* C.A. 9, No. 74–2196, decided January 2, 1975.

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cross-examination of a defendant as to a prior, valid assertion of his Fifth Amendment privilege before a grand jury.

Judge Wilkey dissented on the ground, *inter alia,* that a defendant who testifies at trial waives the privilege against self-incrimination and is subject, as any other witness, to extensive cross-examination calculated to test his credibility (Pet. App. A, pp. 17A–31A). Relying upon *Harris* v. *New York,* 401 U.S. 222, in which this Court held that a defendant could be impeached by statements given the police in the absence of sufficient *Miranda* warnings, Judge Wilkey reasoned that a defendant's failure to offer the police an explanation of incriminating circumstances should be disclosed to the jury in order to enable it reasonably to evaluate the credibility of the defendant's trial testimony.[5]

SUMMARY OF ARGUMENT

The existence of an adequate opportunity to test the credibility of a defendant who takes the stand in his own behalf is crucial to the mission of a trial—accurate ascertainment of the truth. "The need to develop all relevant facts in the adversary system

[5] Judge Wilkey also relied for his dissent on the alternative ground, rejected by the majority (Pet. App. A, pp. 12A–15A), that even if the questioning were deemed improper, the defect was harmless beyond a reasonable doubt and therefore did not warrant reversal of respondent's conviction (Pet. App. A, pp. 31A–33A). While we agree with Judge Wilkey's analysis of this issue, the controversy on the point involves the application of an essentially undisputed standard to the facts of a particular case. Accordingly, we did not present the "harmless error" issue in our petition for certiorari.

is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon,* No. 73–1766, decided July 24, 1974, slip op. 24. Exceptions to the age-old principle demanding "every man's evidence" should not be lightly created nor expansively construed. "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means of ascertaining truth." *Elkins* v. *United States,* 364 U.S. 206, 234 (Frankfurter, J., dissenting, cited with approval in *United States* v. *Nixon, supra,* slip op. at 25, n. 18).

In disallowing a form of cross-examination that exposes a testifying defendant's prior failure to explain seemingly incriminating circumstances, however, the court below ignored this precept and effectively rendered a defendant immune from one of the "traditional truth-testing devices of the adversary process," *Harris* v. *New York,* 401 U.S. 222, 225. Here, respondent took the stand in his own defense and testified that on the morning of the robbery his wife had given him the cash that was found on his person soon after the robbery, for the purpose of obtaining some money orders with which she could pay some bills (Tr. 219). Cross-examination designed to discredit this explanation by revealing that respondent had failed to provide it to the police was, how-

ever, held to be violative of respondent's Fifth Amendment privilege.

We submit that the exclusion of such plainly relevant and probative evidence, going to the credibility of respondent's explanation of otherwise incriminating circumstances, finds no support in either the history or the logic of the Fifth Amendment privilege against self-incrimination. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that the defendant chose to remain silent during post-arrest questioning, once the defendant chooses to take the stand and testify in his own behalf the privilege no longer bars the introduction of such evidence for the limited purpose of impeaching his trial testimony. *Harris* v. *New York,* 401 U.S. 222; *Raffel* v. *United States,* 271 U.S. 494.

The court of appeals' majority erroneously relied on *Griffin* v. *California,* 380 U.S. 609, and *Miranda* v. *Arizona,* 384 U.S. 436, as governing this case. *Griffin* is critically different, however, because it involved a non-testifying defendant, so that the "whole truth" policy of *Harris* and the waiver principles of *Raffel* were not implicated. As for *Miranda,* its principal thrust was to protect against impermissible coercion of arrestees; here, respondent did enjoy a free choice between voluntary silence and voluntary speech. Either election may, of course, carry potentially disadvantageous consequences, but that is no objection so long as the choice between them is not impermissibly compelled.

Nor is a suspect's election to remain silent during custodial interrogation impermissibly burdened by the possibility that, should he decide to testify at trial regarding the seemingly incriminating circumstances of his arrest, he may also be called upon to explain to the jury why he previously failed to offer such information to the police. Such a strategically disadvantageous consequence of invoking the privilege entails nothing more than a choice about trial tactics. It is a kind of consequence inherent in our adversary system, and one that has never been found to place an impermissible burden upon the right to remain silent. See *McGautha* v. *California,* 402 U.S. 183; *Williams* v. *Florida,* 399 U.S. 78. It in no way compels an accused to waive his privilege, in terms of criteria to which this Court has referred for ascertaining voluntariness, nor does it undermine the other values that the privilege against self-incrimination has been thought to protect.

The court of appeals also predicated its decision on the notion that it is unfair to tell a suspect that he has a right to remain silent and then make some use of that silence against him. The *Miranda* warning does not, however, make any kind of promise to the arrestee that his silence will carry with it no adverse consequences. Indeed, it could not properly do so, since, apart from the consequence at issue in this case, other more substantial and more immediate adverse consequences are likely to flow from failure to tender a satisfactory explanation of incriminating circumstances, foremost among which is the enhanced likelihood that

there will be a criminal prosecution of the arrestee. Finally, with regard to the question of fairness, the court of appeals has erroneously equated the standards for assuring an informed *waiver* of a constitutional right with those that should govern a decision *not* to waive an approach that is not only unprecedented and unjustified, but revolutionary in its ramifications.

Apart from these relatively direct constitutional considerations, there remains the question whether such cross-examination should be proscribed because its potential for prejudice inevitably outweighs its probative value. We believe there is no sound foundation for such a conclusion, and that a prior failure to explain is often probative of the falsity of the explanation proffered at trial. It defies common sense to deny that a suspect who has a truthful, innocent explanation for otherwise incriminating facts about which the police have knowledge will in most circumstances decide that disclosure is advantageous despite the fact that it is not required, since an exculpatory explanation, if he has one, may well result in his immediate release from the criminal process and will at a minimum neutralize the danger from those facts. Another practical incentive for disclosure of an exculpatory explanation is the fact that prompt disclosure provides an opportunity for independent verification free of the suspicions of fabrication that prosecutive authorities might naturally be expected to entertain in the case of delayed explanations.

The *Miranda* warnings, informing a suspect that he

has a right to remain silent during custodial interrogation, do not stand for the proposition, nor they intended to foster the impression, that the suspect should maintain his silence notwithstanding any advantage that may accrue to him upon disclosure. The failure to give an explanation to the police will therefore in many circumstances cast real doubt upon the veracity of the explanation when offered at trial.

Although the probative weight to be given any particular failure to explain incriminating circumstances to the police presumably will depend upon many factors—including the relative ease of providing the information to the police and the concomitant ease with which the police could assess its accuracy, as well as the personal characteristics of the accused—there is no reason to assume that the jury will be unable accurately to assess the probative value of such evidence, particularly where, as here, the court cautions the jury that an accused is not required to offer information to the police. Indeed, the defendant has an opportunity at trial to rebut any unfavorable inference to which his silence before the police may have given rise by explaining to the jury his reason for deciding not to provide the police with the information about which he subsequently testifies. In short, it cannot fairly be said that the availability of such evidence is more likely to hinder than to aid the jury in its search for the truth.

The court of appeals believed its contrary conclusion to be dictated by *Grunewald* v. *United States,* 353 U.S. 391, which held that, in the "particular circumstances" of that case, the defendant's refusal on self-

incrimination grounds to testify before the grand jury had no probative impact on the credibility of his trial testimony. That particularized conclusion was no doubt sound, but the facts in *Grunewald* and those of the instant case are worlds apart. Moreover, in *Grunewald* the cross-examination revealed an affirmative claim by the defendant on an earlier occasion that his answers might tend to incriminate him, information that carried a high risk of improperly prejudicing the jury. No such information was conveyed to the jury by the cross-examination of respondent.

ARGUMENT

I. THE JURY SHOULD BE PERMITTED TO ASSESS THE CREDIBILITY OF A DEFENDANT'S TESTIMONY BY LEARNING OF HIS PRIOR FAILURE TO EXPLAIN SEEMINGLY INCRIMINATING CIRCUMSTANCES TO THE POLICE

A. The necessity to test the credibility of a defendant's testimony and to obtain the "whole truth" requires that the jury be allowed to consider his prior failure to tell it to the police

A defendant who takes the stand places himself in a fundamentally different position from one who does not. Once on the stand, he is subject like any other witness to cross-examination designed to assure the reliability of his testimony. Moreover, by choosing to tell his side of the story to the jury, he waives his Fifth Amendment privilege not only as to the part of his story that he wishes the jury to hear, but as to the *whole* story. We submit that both principles—the necessity for testing the truth of a defendant's testimony and the quest for the "whole" truth—make it

proper to cross-examine a defendant as to why he failed to tell his story to the police.[6]

1. Once he takes the stand and testifies on his own behalf, a defendant may be cross-examined like any other witness as to matters reasonably related to the subject of his direct examination[7]—including matters that otherwise could not be brought to the jury's attention, such as prior convictions, *Spencer* v. *Texas,* 385 U.S. 554, 561; evidence unlawfully seized, *Walder* v. *United States,* 347 U.S. 62; refusals to testify on his own behalf at prior trials, *Raffel* v. *United States,* 271 U.S. 494, 499; or inconsistent statements made during police interrogation without proper *Miranda* warning, *Harris* v. *New York, supra.*

A defendant's silence during police interrogation should be no exception to this principle. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that an accused chose to remain silent during interrogation or failed to offer an innocent explanation of seemingly incriminating circumstances, when a defendant testifies the jury should be permitted to assess the credibility of his story by learning that he previously declined to tell it to the authorities. A defendant's alibi or ex-

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[6] The guilty criminal defendant has substantial incentives to commit perjury, in view of the personal consequences of a conviction. At the same time, the constraints that normally operate to discourage witnesses from prevarication apply with diminished force to the criminal defendant. These factors make it especially important to allow thorough probing of the veracity of the testifying defendant.

[7] See 3A Wigmore, *Evidence* § 890 (McNaughton rev. ed. 1961) and cases cited therein.

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culpatory testimony—often central to his defense—should not be any more immunized from accurate evaluation than the testimony of any other witness. Nor should an accused's choice to remain silent during police interrogation thereby license him to give false testimony at trial, free from the possibility that he may be called upon to explain why he failed to give the exculpatory information to the authorities at the time of his arrest.

Harris v. *New York, supra,* provides strong support for this proposition. There, the defendant, charged with selling heroin to an undercover police officer, took the stand in his own defense and denied the sale. On cross-examination, the defendant was asked about certain statements he had made to the police that were inconsistent with his trial testimony. Those statements had not, however, been preceded by proper *Miranda* warnings, and they therefore had to be deemed presumptively coerced in violation of the defendant's Fifth Amendment privilege. *Miranda* v. *Arizona,* 384 U.S. 436. The trial judge permitted the questioning, instructing the jury that the statements attributed to the defendant by the prosecution could be considered only in determining credibility and not as evidence of guilt.

This Court held that the Fifth Amendment does not bar the introduction of such statements, although made without adequate *Miranda* warnings, for the limited purpose of impeaching a defendant's trial testimony. While such statements are irrebutably presumed to be compelled in derogation of the Fifth

Amendment when admitted as evidence of guilt, the Court in *Harris* reasoned (401 U.S. at 224–225):

> It does not follow * * * that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes * * *. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

The Court observed that prohibiting the use of such statements would be tantamount to licensing a defendant to resort to perjured testimony in reliance on the government's disability to challenge his credibility. "But that privilege [against self-incrimination] cannot be construed to include the right to commit perjury * * * by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 225–226.

If the jury may test a defendant's credibility by reference to prior inconsistent statements elicited in presumptive violation of his Fifth Amendment privilege, it follows that the jury should be permitted to test a defendant's credibility by reference to his prior inconsistent silence at the time of his arrest, when there has been no such violation.[8] Had respondent

[8] Two of the circuits that have considered the question whether a defendant's silence at police interrogation can be used to impeach his credibility at trial have concluded, in light of *Harris*, that such cross-examination is constitutionally permissible. Thus, in *United States* v. *Ramirez*, 441 F. 2d 950 (C.A. 5), certiorari denied, 404 U.S. 869, the defendant testified at trial that he had been coerced into selling heroin by

given the police an explanation of the source of his money contrary to the one he subsequently gave at

threats of harm from strangers. On cross-examination he admitted that he had never told the police this fact, and in closing argument the prosecutor urged that this silence was not consistent with the conclusion that the trial testimony was truthful. On appeal, the Fifth Circuit, relying on *Harris*, stated (401 U.S. at 954):

"Once [the defendant] elected to testify and assert the defense of coercion he became subject to the 'traditional truth-testing devices of the adversary process,' including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest."

See also, *United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234 (C.A. 3); *Agnellino* v. *State of New Jersey*, 493 F. 2d 714 (C.A. 3); *United States* v. *Quintana-Gomez*, 488 F. 2d 1246 (C.A. 5); contra: *United States* v. *Brinson*, 411 F. 2d 1057 (C.A. 6); *Robideau* v. *Rhay*, 431 F. 2d 880 (C.A. 9); *Fowle* v. *United States*, 410 F. 2d 48 (C.A. 9); *Johnson* v. *Patterson*, 475 F. 2d 1066 (C.A. 10), certiorari denied, 414 U.S. 868; *Deats* v. *Rodriguez*, 477 F. 2d 1023 (C.A. 10). In its latest pronouncement on the subject, the Fifth Circuit seems to have retreated slightly from its broad holding in *Ramirez*, *supra*. See *United States* v. *Fairchild*, C.A. 5, No. 74-2097, decided January 8, 1975.

The position of the Third Circuit is not altogether clear. In *Burt*, *supra*, the defendant testified that the shooting death for which he had been charged with murder had been accidental. The prosecution elicited on cross-examination the fact that, when he had been arrested for an unrelated crime soon after the shooting, the defendant had not sought to secure assistance for the victim. The lead opinion in *Burt* held that the cross-examination was permissible because the defendant's silence during police interrogation had occurred before he stood accused of the murder. The other two members of the panel, however, issued a concurring opinion on the ground that *Harris* allows impeachment by prior silence at a police station.

In *Agnellino*, *supra*, the defendant made statements to the police but failed to indicate the source of stolen goods that were found on his property. He testified at trial that he had pur-

trial, it is clear under the *Harris* holding that such explanation would have been admissible to impeach his credibility even had it not been preceded by *Miranda* warnings. The same reasoning would seem to apply even more forcefully to the instant case, where the police acted entirely properly in providing respondent full *Miranda* warnings, no statements of any kind were elicited, and there is no question of coercion.

Moreover, while the use of *statements* elicited without *Miranda* warnings may, as this Court recognized in *Harris*, give rise to an arguably "speculative possibility that impermissible police conduct will be encouraged thereby" (401 U.S. at 225)—a possibility outweighed, in the Court's view, by the benefit to the fact-finding process of giving the jury an opportunity to assess the credibility of the defendant's testimony—cross-examination such as that in the instant case, which merely apprises the jury of a defendant's *silence* before the police, obviously does not present even that nominal danger.

2. By the same token, a defendant's silence during police interrogation should be no exception to the re-

chased them. During closing argument, the prosecutor commented upon the defendant's prior failure to provide this information to the police. The lead opinion, relying upon the concurring opinion in *Burt*, held that the prosecutor's comment was permissible. The other two members of the panel, however, concurred on the basis that what the defendant had *told* the police was inconsistent with his trial testimony. They viewed *Burt* as a situation in which the defendant's *conduct* in not seeking assistance for the shooting victim was inconsistent with his testimony at trial that the shooting had been accidental.

lated principle that a defendant who offers himself as a witness thereby waives his Fifth Amendment privilege *without reservation.* "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel* v. *United States, supra,* 271 U.S. at 497. Having chosen to waive the privilege at trial, therefore, a defendant should not at the same time be insulated from consideration of the import of his prior silence before the police. He "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events"—such as his prior silence before the police— "* * * without subjecting his silence to the inferences to be naturally drawn from it." *Caminetti* v. *United States,* 242 U.S. 470, 494.

There is sound policy in requiring a defendant who offers himself as a witness to do so without reservation and in allowing the prosecution to probe all seemingly incriminating circumstances relevant to the defendant's testimony, including the fact that he previously failed to give the police the exculpatory information he gives the jury. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel, supra,* 271 U.S. at 499. A defendant who becomes a witness in his own behalf benefits from the opportunity to tell the jury his side of the story. But the opportunity should not be one-sided:

> [An accused's] voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between them all. *Any* voluntary disclosure by the accused * * * distorts the probative picture. * * * The accused has the choice at the outset [whether or not to take the stand], unhurried and with full knowledge that all questions will relate to his incrimination [8 Wigmore, *Evidence,* § 2276, pp. 459–460 (McNaughton rev. ed. 1961)].

A fair balance of advantages requires that the jury have an opportunity to hear the entire story—including the fact that the defendant previously failed to tell his side of the story to the police.

The decision of the court of appeals in the instant case squarely conflicts with the analysis of this Court in *Raffel* v. *United States, supra,* and affirmance in the case at bar would, we submit, require the Court to overrule *Raffel* or confine that precedent to its specific facts. In *Raffel* this Court held that it was permissible to cross-examine a defendant as to his reasons for failing to take the stand at a prior trial, when his purpose in testifying at the second trial was to rebut a witness who testified at both trials. Raffel's first trial, in which he had failed to testify, resulted in a mistrial; at his second trial on the same charge the government presented the same witness who had appeared at the first trial. This time, Raffel chose to take the stand and rebut the witness's testimony. Although comment upon a defendant's failure to take the stand was prohibited by statute and judicial decision (18 U.S.C. 3481; *Wilson* v. *United States,* 149 U.S. 60), the judge then asked Raffel questions that

required him to disclose that he had not testified at the first trial and to explain why he had not done so. The second trial resulted in conviction.

The Court, in an opinion by Justice Stone, determined that the Fifth Amendment privilege provides no basis for excluding the defendant's admission at the second trial that he had failed to take the stand at the previous trial because "I did not think there was enough evidence to do it" (271 U.S. at 495, note). The Court rejected the theory that the defendant's original immunity should be held to survive his appearance at the second trial (*id.* at 498–499):

> The only suggested basis for [extending the immunity beyond the first trial is the] pressure on the accused to take the stand on the first trial for fear of the consequences of his silence in the event of a second * * *. [But e]ven if, on his first trial, he were to weigh the consequences of his failure to testify * * * in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantive manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.

Once the defendant takes the stand at the second trial, therefore, he effectively waives his immunity

retroactively as to both trials, since "[w]e can discern nothing in the policy of the law against self-incrimination which would require the extension of the immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify." 271 U.S. at 499.

If a defendant under such circumstances waives his Fifth Amendment privilege respecting inquiry into his failure to testify at a prior trial, it follows that a defendant who takes the stand at his trial also waives any Fifth Amendment privilege he may have relating to his silence during police interrogation. Like Raffel's choice not to testify at his first trial, respondent in his encounter with the police chose not to tell them where he obtained the money found on his person. We submit that his omission, like Raffel's, can properly be revealed to the jury to aid them in assessing his credibility. Any other rule unacceptably enhances the prospect that jury verdicts will be based upon fabricated accounts not adequately tested by cross-examination.[9]

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[9] *Stewart* v. *United States*, 366 U.S. 1, cited by the majority below, is not inconsistent with *Raffel*. In *Stewart*, a defendant who pleaded not guilty by reason of insanity took the stand and made various unintelligible statements. During cross-examination the prosecutor elicited the fact that the defendant had not testified during two previous trials, which had resulted in convictions that were reversed on appeal. In ruling this cross-examination improper, the Court noted that neither *Raffel* nor *Grunewald* was applicable, since the cross-examination in *Stewart* sought to discredit the claim of insanity rather than to impeach the defendant's testimony.

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B. Neither Griffin nor Miranda requires the result reached by the court of appeals

Neither *Griffin* v. *California, supra,* nor *Miranla* v. *Arizona,* 384 U.S. 436, both relied upon by the majority below, is inconsistent with this analysis. At most, those cases express the proposition that a defendant may, in accord with his Fifth Amendment privilege, remain silent without his silence being used against him *as evidence of guilt.* But that proposition is fully consonant with use of a defendant's silence as evidence of his prevarication on the witness stand.

1. The defendant in *Griffin* was convicted of first degree murder after a jury trial in which he chose not to take the stand in his own defense. The trial court instructed the jury that, while the defendant had a constitutional right not to testify, and his failure to deny or explain incriminating circumstances of which he had knowledge did not create a presumption of guilt or relieve the prosecution of any of its burden of proof, the jury could take defendant's failure to testify as to such evidence into consideration "as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable" (380 U.S. at 610). In closing argument, moreover, the prosecution made several allusions to the defendants' failure to deny or explain incriminating circumstances. On those facts, the Court reversed Griffin's conviction, holding that such comments to the jury about a defendant's failure to testify violated the defendant's Fifth Amendment privilege.

The Court in *Griffin* was concerned about the direct use of a defendant's decision not to testify (which was undeniably an invocation of his privilege against self-incrimination) as affirmative evidence of guilt. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into *evidence against him* is quite another." 380 U.S. at 614 (emphasis added). The Court neither said nor implied that the same rule would apply to evidence used to impeach a defendant's trial testimony, nor did the Court mention *Raffel, supra,* which permits comment upon a defendant's failure to take the stand at a previous trial for the purpose of impeaching his testimony at a subsequent trial. Indeed, it seems clear that the decision in *Griffin* did not call into question the holding in *Raffel,* since at the time *Raffel* was decided it had long been the rule in federal courts that no comment could be made upon a defendant's failure to take the stand. See *Wilson* v. *United States, supra*; 18 U.S.C. 3481.[10]

Moreover, the situation in *Griffin* presented a problem that is absent in circumstances such as *Raffel* or the instant case. Under the approach followed by the California courts in *Griffin*, the jury was expressly encouraged to infer that unexplained incriminating circumstances were true, and the defendant, since he did not testify, had no opportunity to rebut the infer-

[10] The Court has specifically reserved the related question whether an accused is constitutionally entitled to have the jury instructed that his silence must be disregarded. *Griffin, supra,* 380 U.S. at 615, n. 6. See also *Bruno* v. *United States,* 308 U.S. 287, 292.

ence. As a result of invoking the privilege in *Raffel* (and of remaining silent in the instant case), however, the defendant at most risked being called upon to explain why he previously failed to take the stand or provide information. The jury may disbelieve his explanation, and their disbelief will cast doubt upon the veracity of his present testimony. On the other hand, the jury may be sufficiently satisfied with the explanation that any unfavorable inference otherwise flowing from his previous silence is effectively rebutted. Thus, in *Raffel,* as in the instant case but unlike *Griffin,* the defendant had an opportunity to eliminate any unfavorable inference resulting from his silence, and the accuracy of the inference was "subject to the normal testing process of an adversary trial." *Michigan* v. *Tucker,* 417 U.S. 433, 449.

2. The court of appeals' reliance on *Griffin* was predicated on its conclusion that respondent, like Griffin, was "exercis[ing] his constitutional right to remain silent" and that the cross-examination constituted an attempt to penalize him for assertion of this right (Pet. App. A, p. 10A). The court of appeals did not independently analyze the validity of its focal postulate that respondent was exercising a "constitutional right" when he remained silent and was impermissibly penalized therefor when cross-examined, but simply relied upon the following dictum contained in a footnote in *Miranda* (384 U.S. at 468, n. 37):

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

In considering whether this dictum should now be elevated into a constitutional holding, the circumstances of its utterance merit attention: (1) None of the cases before the Court in the *Miranda* group involved defendants who had stood silent or whose silence had been used in any manner against them at trial; (2) since the thrust of the Court's rationale in *Miranda* focused upon the inherently coercive effects found by the Court to accompany custodial interrogation, the characterization of an arrestee's voluntary silence as an exercise of the Fifth Amendment privilege was logically unrelated to the theme of coercion that dominated the Court's opinion; and (3) the quoted statement contained no explication of the basis for the conclusion it contained, and the case law cited in support of the conclusion (by "cf."), including *Griffin*, dealt with quite distinct situations.

In our view, the Fifth Amendment privilege does not confer any *per se* "right to remain silent" as a personal entitlement that the government is affirmatively obliged to fulfill. The obligation that the Fifth Amendment privilege imposes upon the government is a negative one to avoid compulsion, and the correlative right is to be free from being *compelled* to speak. Cf. *Michigan* v. *Tucker, supra.* The right to be free from improper compulsion is by its nature not a right that the individual *exercises* but, rather, one that he

enjoys.[11] Accordingly, it was not only too facile, but also erroneous, to characterize the cross-examination to which respondent was here subjected as a penalty for the exercise of a right.[12]

But even putting to one side these conceptual objections to the *Miranda* dictum and accepting it as a correct statement of the governing rule, it is properly understood as a bar to use of a defendant's silence during interrogation only in the government's case-in-chief. Following the logic of *Harris* and *Raffel,* and the principles of impeachment and Fifth Amendment waiver enunciated therein, the dictum would not prohibit asking a defendant on cross-examination, for

[11] By contrast, the ordinary application of the self-incrimination provision requires an affirmative assertion of a colorable claim that the information sought of the individual may tend to incriminate him. See, *e.g.*, *United States* v. *Kordel*, 397 U.S. 1, 10; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113.

[12] Theoretically, a similar analysis might be adduced in the case of the non-testifying defendant. However, the treatment of such a defendant's failure to take the stand as an "invocation" of the privilege against self-incrimination is firmly rooted in our law and reflects a reasonable presumption that such a defendant, if called to the stand, would invoke the privilege (he is, of course, not permitted to be called, because of the risk of impermissible prejudice if he is forced to claim possible self-incrimination before the jury). Whatever may be said of the exercise-of-right/penalty analysis in the *Griffin* context, however, we believe it would be inappropriate to extend it to the instant circumstances. Moreover, the situations are distinguishable insofar as the practice of comment and inference on a defendant's failure to take the stand entails a perceptibly greater hazard of prejudice flowing from the act of exercising the right (rather than simply the reasonable inferences arising from silence) than is present in the instant situation.

the purpose of impeaching his trial testimony and eliciting his "whole" story, why he remained silent at the time of arrest.

II. TESTING OF A DEFENDANT'S CREDIBILITY BY REFERENCE TO HIS PRIOR FAILURE TO GIVE HIS STORY TO THE POLICE NEITHER COERCES NOR IMPERMISSIBLY BURDENS HIS CHOICE TO REMAIN SILENT BEFORE THE POLICE, NOR IS IT UNFAIR

The court of appeals' conclusory assertion that use of an accused's silence at police interrogation to impeach his trial testimony is tantamount to a penalty upon the exercise of his Fifth Amendment privilege may also rest upon the unarticulated premise that this consequence impermissibly burdens the choice to remain silent. If this was the premise, however, it is difficult to see where the impermissible burden arises. In the first place, it seems to us speculative and even unlikely as an empirical matter that a defendant will be deterred from remaining silent during police questioning by the mere possibility that, should he testify at trial, he then might be called upon to explain why he had not earlier offered his story to the authorities, and that the jury then might be dissatisfied with his explanation. Such an adverse consequence is so remote from the circumstance of police interrogation and—assuming the defendant has a reasonable explanation for why he chooses to remain silent—so unlikely, that it cannot be assumed to have a real deterrent impact upon the decision to remain silent during police interrogation.

But even if it had some such effect, it does not follow that this represents an impermissible burden on the exercise of a constitutional right; rather, we submit that it represents a proper consequence of the defendant's election to withhold any explanation of suspicious circumstances from the police, while choosing to provide one at trial. In the following discussion we show that this consequence is considerably less onerous than many other constitutionally sanctioned consequences of choosing to remain silent, and that it does not improperly compel an accused to speak against his will. We next show that there is nothing "unfair" in telling an accused that he may remain silent without telling him of all possible adverse consequences that could flow from his decision to remain silent. Finally, we show that use of an accused's silence at the time of arrest to impeach his trial testimony does not jeopardize any of the values that the Fifth Amendment privilege is thought to protect.

A. *The possibility of impeachment of a defendant's testimony by reference to his prior silence is a far less severe detriment than other disadvantages that this Court has held may constitutionally attach to exercise of the privilege against self-incrimination, nor does it constitute an impermissible compulsion to answer police questions.*

Even assuming that the Fifth Amendment privilege is the source of an arrestee's right to silence and that the privilege is fulfilled only when he is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Miranda*

v. Arizona, supra, 384 U.S. at 460; *Malloy* v. *Hogan,* 378 U.S. 1, 8, it does not follow that, in order to be "unfettered," the choice must be without consequence. On the contrary, "nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." *Garrity* v. *New Jersey,* 385 U.S. 493, 507 (Harlan, J., dissenting).

1. We have already adverted to the "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan* v. *Tucker, supra,* 417 U.S. at 450. Manifestly, this includes knowledge of the defendant's failure to explain seemingly incriminating circumstances to the police at a time when the accuracy of the explanation could have been independently verified. On the other hand, from the standpoint of the accused, the possible adverse consequence at trial of remaining silent at police interrogation represents no hazard to the integrity of the privilege. Indeed, the consequence is nothing more than a nominal strategic disadvantage at trial: the possibility that, if he provides an alibi or exculpatory testimony at trial, he may be called upon to explain why he failed to offer information to the police, and the jury might be dissatisfied with his explanation.

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"This consequence simply does not amount to "compulsion" in the sense relevant for bringing the protection of the self-incrimination provision into play—*i.e.*, the kind of circumstance "likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *Garrity* v. *New Jersey, supra,* 385 U.S. at 497. It does not remotely resemble "the lurid realities which lay behind the enactment of the Fifth Amendment * * *, the pain of incarceration, banishment, or mutilation," *Griffin* v. *California, supra,* 380 U.S. at 620 (Stewart, J., dissenting). It is a far cry from such "penalties" for silence as third-degree torture, *Brown* v. *Mississippi,* 297 U.S. 278; prolonged isolation from family or friends in a hostile setting, *Gallegos* v. *Colorado,* 370 U.S. 49; physical and mental exhaustion from subjection to seemingly endless interrogation, *Watts* v. *Indiana,* 338 U.S. 49; loss of job, *Garrity* v. *New Jersey, supra*; or subjection to the kinds of police interrogation practices described in *Miranda* itself.

2. In fact, the possibility of such a strategic disadvantage at trial following upon silence during police interrogation is far less grave than many similar strategic disadvantages permissibly following upon invocation of the privilege in other circumstances. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. * * * The threshold question is whether compelling the election impairs to an appreciable extent any of the poli-

cies behind the rights involved." *McGautha* v. *California,* 402 U.S. 183, 213.

In *McGautha,* this Court faced a Fifth Amendment challenge arising from the dilemma confronting a defendant in a capital case under a state unitary trial procedure, in which guilt and sentence were decided by the jury in a single proceeding. The petitioner alleged, among other things, that his decision to exercise his constitutional right to avoid self-incrimination by not taking the stand at trial was unconsitutionally penalized by the fact that, by failing to take the stand, he lost his opportunity to be heard by the jury in mitigation of sentence and therefore suffered an increased risk of being sentenced to death. Present also was the suggestion that other defendants facing the dilemma would feel compelled to waive their right not to testify on guilt or innocence in order to secure an opportunity to testify in mitigation of sentence. After assaying the various tactical choices facing an accused during and before a criminal trial, Justice Harlan concluded in his opinion for the court that the pressures that might cause similarly situated defendants to furnish arguably testimonial or incriminating information were no different from other pressures licitly generated by the innate complexity of criminal litigation (402 U.S. at 216–217):

> We are thus constrained to reject the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself, unless there is something which serves to distin-

> guish sentencing—or at least capital sentencing—from the situations given above. Such a distinguishing factor can only be the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make. We do not think that the fact that a defendant's sentence, rather than his guilt, is at issue creates a constitutionally sufficient difference from the sorts of situations we have described.

The Court's rationale, realistically taking account of the accused's inherent need to make tactical judgments about the conduct of his defense to criminal charges against him, would seem to apply with equal or greater force to the instant case. Just as a defendant's decision to waive his Fifth Amendment privilege for the purpose of mitigating his sentence is not constitutionally distinguishable from his decision to waive his privilege for the purpose of testifying in his own behalf, so too an arrestee's decision to "waive his privilege" at police interrogation for the far less drastic purpose of avoiding impeachment when he testifies at trial is constitutionally indistinguishable from his decision to waive his privilege at trial. Indeed, it is also procedurally indistinguishable, since an accused at police interrogation will feel induced to waive his privilege for this reason, if at all, only to the extent that he actually plans to waive his privilege at trial. Cf. *Brady* v. *United States,* 397 U.S. 742; *McMann* v. *Richardson,* 397 U.S. 759; *Parker* v. *North Carolina,* 397 U.S. 790.

An arrestee's evaluation of his options in deciding whether to speak or remain silent in response to police questions will depend upon many factors, such as his perception of the amount of information that the police already have obtained; his assessment of the likelihood that, should he cooperate with the police, he will be able to allay their suspicion and avoid subjection to criminal charges; or his expectation that by cooperation he may obtain more lenient treatment from the court. The decision whether to give exculpatory information is likely to be governed by the relative ease with which the authorities could verify the information and the likely impact of the information on their assessment of his guilt or innocence. If a relatively simple explanation of suspicious circumstances can lead to an arrestee's quick release from the criminal process, it seems to us likely as an empirical matter that he would offer it. There is, in any event, no basis for concluding that one additional factor in the calculus—the likelihood that if the exculpatory information is not offered to the police, and the arrestee is prosecuted, and he decides at trial to take the stand in his own behalf, he may then be required to explain his prior silence—would materially influence the decision to speak or remain silent, let alone that it would be so weighty as to overwhelm his ability to make a rational and voluntary choice.[13]

[13] In considering the question whether our position threatens to impose a constitutionally intolerable burden on the arrestee's decision to speak or remain silent, it is useful to distinguish between those who are guilty of the offense of which they are

3. *Williams* v. *Florida*, 399 U.S. 78, like *McGautha*, dealt with and sustained a procedure that imposed substantial adverse consequences on an exercise of the privilege. The Court in *Williams* upheld a notice-of-alibi statute requiring that a defendant who planned to present an alibi defense at trial provide the prose-

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suspected and those who are not. While we do not suggest that the guilty have any less right to be free from governmental compulsion to speak than the innocent, we do submit that their decision to stand mute is likely to flow from the fact that they have no satisfactory explanation to tender; they are thus unlikely to feel compelled to provide an explanation to the police by the prospect that a fabricated story presented at trial will be subject to impeachment in this manner.

Many innocent persons who can offer an explanation for seemingly incriminating circumstances will, of course, elect to do so in the hope that such action will bring about a speedy and favorable termination of police suspicions. Such persons, like the guilty, clearly would be unaffected in their election to speak by questions of possible future impeachment, since their choice is to speak in any event.

That leaves the group of arrestees who, although innocent and/or possessing a valid exculpatory explanation of seemingly suspicious circumstances, choose not to respond to police questioning—perhaps from fear or distrust of the police, perhaps from instinctive caution, timidity, or belligerence, perhaps in adherence to advice of counsel. Only as to this group could the possible future consequences of failure to respond to police inquiry materially affect the decision whether or not to speak. But these individuals already face immediate and substantial "compulsive" considerations, such as the prospect that their silence will result in the bringing of criminal charges against them. If they find the compulsion of such considerations resistible, it is hard to imagine that the remote and speculative possibility of adverse consequences at trial will provide meaningful compulsion to speak.

In short, it will as an empirical matter be the rare case indeed in which the possibility of future impeachment will actually operate to induce an arrestee to speak.

cution with the names of alibi witnesses before trial. It concluded that the statute does not unconstitutionally burden the defendant's Fifth Amendment privilege, even though failure to comply could result in exclusion of the alibi evidence at trial. The defendant in that case complied with the notice-of-alibi rule, and the state prosecutor used a deposition of the defendant's alibi witness to impeach the witness's testimony. The defendant claimed on appeal that his privilege against self-incrimination was thereby violated, since he had been required to furnish the State with information useful in convicting him, under penalty of being prohibited from presenting his alibi witness. This Court disagreed (399 U.S. at 83–85, emphasis supplied):

> The defendant in a criminal trial is frequently forced to testify himself * * * in an effort to reduce the risk of conviction. * * * That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against self-incrimination.
>
> * * * * *
>
> At most, the rule only compelled petitioner to *accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense* * * *.

Although pre-trial silence would of course have subjected Williams to the significant strategic disadvantage at trial of being barred from presenting an alibi defense, this consequence was not considered to impose an impermissible burden upon his election whether to remain silent.

The same logic would seem to compel a reversal in the instant case. If in consequence of maintaining silence prior to trial a defendant may be barred *altogether* from presenting his alibi defense during trial, surely it is permissible—and far less burdensome—to attach as a consequence of a defendant's silence in response to police questions the possibility that he may be asked to explain his silence should he subsequently decide to offer an alibi or exculpatory testimony during trial. We reiterate in this connection that his failure to present his story to the police does not bar him from presenting his story to the jury, as silence would have in *Williams:* it simply entitles the jury to know, when he presents it to them, why he failed to give the information to the authorities at the time of his arrest. At most, an arrestee who plans to take the stand and tell his story at trial, if concerned that he might then be asked to explain his previous silence, may be somewhat more likely to "accelerate the timing of his disclosure" than otherwise. But this consideration is hardly tantamount to an unconstitutional burden upon his choice to remain silent.

Nor does this consequence of choosing to remain silent at police interrogation unconstitutionally burden a defendant's decision to take the stand at trial.

A defendant who contemplates testifying in his own behalf is faced with many analogous—indeed, considerably more burdensome—disadvantages. Once he takes the stand, he cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination, see, *e.g., Brown* v. *United States,* 356 U.S. 148, *Fitzpatrick* v. *United States,* 178 U.S. 304, 314–316; he may also be impeached by proof of prior convictions, *Spencer* v. *Texas, supra,* 385 U.S. at 561; and if his motion for acquittal at the close of the government's case is denied, he risks bolstering the government's case sufficiently to support an otherwise unjustifiable verdict of guilty if he puts on a defense, *e.g., United States* v. *Calderon,* 348 U.S. 160. 164.

In sum, whatever the inducement that might be felt by an arrestee to respond to police questioning because he otherwise might be asked to explain at trial why he had not provided the same explanation to the police (or that might be felt by a defendant at trial to forego his opportunity to take the stand for the same reason), such inducement "does not derive from any coercion of the State, instead it arises from the desire of the accused to act in his own enlightened self-interest." *Segura* v. *Patterson,* 402 F. 2d 249, 253 (C.A. 10). An arrestee may feel slightly more induced to provide the police with exculpatory information than he otherwise would, or a defendant slightly more deterred from taking the stand, but only marginally so, and only to the extent that one course of action thereby becomes tactically more advantageous than another.

B. It is not "unfair" to advise an accused that he has a right to remain silent and then use his silence to impeach his trial testimony

Contrary to the assertion of the court of appeals, we see nothing "unfair" about advising an arrestee that he has a "right to remain silent" and then using his silence to impeach his trial testimony although he had not been warned of this possible development. The fact that future impeachment use may result from silence does not make it untruthful to advise a suspect that he has a right to choose silence. An accused is *not* advised that his choice to remain silent cannot be used against him.

Moreover, as has already been indicated, a defendant faces many tactical disadvantages from choosing to remain silent at different stages of the criminal process, and there is no warrant for assuming that these choices are uninformed simply because all the possibly disadvantageous consequences stemming therefrom are not spelled out at every juncture. Cf. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226. An accused who has an innocent explanation for otherwise incriminating circumstances certainly can be assumed to know that the consequence of choosing silence during police questioning is the rather drastic one of facing potential indictment, possible pretrial detention or bail, and trial.

The reason for requiring that an accused be told that he has a "right to remain silent" is to counteract what are thought to be coercive aspects of incommunicado police questioning. *Miranda* v. *Arizona, supra,* 384 U.S. at 457, 458. So long as the interrogation is fair and noncoercive, therefore, the accused presumably enjoys the "right" that he has been promised, and there is nothing misleading about advising him of this choice. Thus, in the instant case, there can be no question that the goals of the *Miranda* decision were served when respondent was given the election between speaking voluntarily and voluntarily remaining silent.

To the extent that the court of appeals discerned unfairness because of a surmise that respondent may have decided to remain silent in reliance on an implied promise that his silence would not be used against him at trial, it presupposes that the decision to remain silent must be as carefully circumscribed with assurances that it be "informed" as is the decision to speak. But this is tantamount to a requirement that the government provide warnings about all the possibly adverse consequences that may flow from invocation of constitutional rights—a requirement that has no logical foundation in the recognized need to assure that *waiver* of constitutional rights be knowledgeable. To assume that an accused has been somehow tricked into invoking his "constitutional privilege" because he may not have been aware of certain disadvantages that accompany its invocation is a peculiar notion that has no analog in the law of voluntary waiver or entrapment.[14]

[14] If this were indeed the ground of the court's decision, it implies that the cross-examination at issue would pass constitutional muster had respondent been apprised at police interrogation that, should he decide to take the stand at trial, his prior silence could then be used to impeach his credibility. While we have no objection to modifying the warnings in the future to provide such notice if this Court deems such modification necessary to assure fairness to arrestees, it seems to us that the addition

Johnson v. *United States,* 318 U.S. 189, 197, cited by the majority below, dealt with a defendant's decision whether to invoke the privilege at trial during the course of his trial testimony, without first being warned by the court that it would allow the prosecution to comment upon any claim of privilege as evidence of the truth of unexplained incriminating facts. This Court held that it would be unfair to allow the jury to consider the fact that the accused invoked the privilege under these circumstances, where "that action may be said to *affect materially* the accused's choice of claiming or waiving the privilege and results in prejudice." *Ibid.*; emphasis added. Use of an arrestee's silence at police questioning for the limited purpose of impeaching his trial testimony, however, could not be said to "materially affect" his choice of claiming or waiving the privilege.

C. The constitutional values and policies reflected in the privilege against self-incrimination were not impaired by the cross-examination of respondent

The values thought to be reflected by the privilege against self-incrimination were comprehensively catalogued by the Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55:

> The privilege against self-incrimination * * * reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment or abuses; our sense of fair play [and] * * * respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter for the guilty," is often "a protection to the innocent." *Quinn* v. *United States,* 349 U.S. 155, 162 [footnote omitted].

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of such a statement might tend to confuse an arrestee about his constitutional rights and make it more difficult for him to understand the *Miranda* warnings.

The cross-examination in the case at bar did not undermine these values.

a. A suspect whose failure to respond to police questions may be used to impeach his trial testimony is not exposed to the "cruel trilemma of self-accusation, perjury, or contempt." Respondent was free to make a false statement or to remain silent (as he in fact did), without any fear of invoking at least two of the penalties of the "cruel trilemma"—perjury and contempt.

b. Neither would the rule for which we contend subvert the preference for an accusatorial system of criminal justice. Confessions, so long as they are voluntarily made, have a recognized and valid place in our accusatorial system. Since, for the reasons we have previously discussed, the possible use of silence for impeachment does not impair the voluntary character (in the constitutionally relevant sense) of the arrestee's election to speak or stand mute, the rule would not perceptibly alter the existing character of our accusatorial system.

c. Nor would such use increase the likelihood of inhumane treatment. Since it is an arrestee's *silence,* rather than any statements elicited by the police, that is used to discredit his trial testimony, the police have no incentive to violate the law and elicit statements coercively—an arguably "speculative possibility" of the rule enunciated in *Harris, supra.* Indeed, if such use of silence during custodial interrogation modifies police behavior in any direction, its likely tendency is to preserve an accused's right to remain silent by diminishing the determination of the police to procure a statement.

d. Nor are values of privacy jeopardized by such use of an accused's silence during police interrogation to impeach his trial testimony. Unlike a witness before a grand jury or legislative committee, whose appearance is not necessarily predicated on probable cause, a suspect lawfully arrested by the police has already satisfied the threshold requirement of probable cause. Moreover, by the time the prosecution makes reference to his silence, the individual has already gone to trial and has chosen to testify in his own defense. Indeed, he will choose to reveal personal information to the police, if at all, only to the extent that he plans to testify at trial and in so doing reveal the same personal information to the jury. Cf. *Williams* v. *Florida, supra.* This inducement to reveal personal information is therefore no more an assault on his privacy than is necessarily entailed by his own tactical choices within the legitimate criminal justice process.

e. Finally, this case implicates no concerns about the trustworthiness of "self-deprecatory statements." *Miranda, supra,* 384 U.S. at 455, n. 24, and 470; see 8 Wigmore, *Evidence,* § 2251 (McNaughton rev. ed. 1961). At most, an accused may decide that it is better to reveal his exculpatory evidence earlier (at police interrogation) rather than later (at trial). In no event, however, will the mere possibility that his silence at police interrogation might be subsequently used to discredit his testimony induce him to make unreliable self-deprecatory statements.

Under these circumstances—given that the only burden upon invocation of the privilege is a strategic disadvantage at trial of the sort inherent in our adversary system, and given the absence of any significant encroachment upon the policies or values reflected by the privilege—the decision below has failed to overcome the burden of justifying the exclusion of relevant evidence enhancing the jury's ability to assess the credibility of respondent's testimony. As Mr. Justice Frankfurter observed in *Nardone* v. *United States,* 308 U.S. 338, 340, "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." No such justification can be demonstrated here.

III. THE JURY IS COMPETENT TO GAUGE THE PROBATIVE WEIGHT OF SUCH IMPEACHMENT EVIDENCE

So far, our argument has focused on the proposition that the Fifth Amendment privilege poses no

necessary bar to cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest. There remains the issue whether, in these circumstances, the danger of impermissible use of this evidence so far outweighs its probative value that the jury should be denied an opportunity to consider it.[15] We submit that the risk of prejudice is dwarfed by the legitimate desire to protect against false and fabricated defenses and the concomitant need to subject the testimony of defendants to thorough cross-examination.

1. Common sense and human experience draw one inevitably to the conclusion that a suspect's failure to provide an explanation for seemingly incriminating circumstances at the time of arrest is probative on the issue of the veracity of the explanation of those circumstances offered at trial. By "probative" we do not, of course, mean that an arrestee's unwillingness to offer the police an explanation for seemingly incriminating circumstances conclusively establishes the falsity of any explanation tendered at trial. Doubtless there are times when a suspect has an explanation

[15] Even a rule so based would appear to have constitutional underpinnings, although it is far from clear whether this concern is grounded on the privilege against compelled self-incrimination or the due process clause. This Court in *Grunewald*, *supra*, did not state the constitutional source of its weighing of probative value against prejudicial impact in that case. It simply noted that, while such considerations are "usually within the discretion of the trial judge * * * where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question." 353 U.S. 391, 423–424.

that would neutralize a seemingly incriminating circumstance but is nevertheless unwilling to provide it to the police at the time of arrest: *e.g.*, he may have been advised by counsel or may believe that he should never volunteer any statement to the police in such circumstances before reviewing the situation with a lawyer; he may fear that the explanation, although neutralizing one piece of evidence, will lead police to other evidence incriminating him in the offense under investigation or other offenses; his response to the situation may be dominated by fear or hostility impelling him to be silent. Nevertheless, it seems to us sufficiently likely as an empirical matter that a suspect will often provide the police with a genuinely innocent explanation that may lead to his quick release from the criminal process, if he has one, even after he is warned that he need not speak a word. This is particularly so because the opportunity to obtain prompt, independent verification of the explanation and to obviate suspicions of fabrication is likely to be evanescent.

We do not contend that the silence of a suspect, when questioned by the police after having been expressly told of his right to remain silent, may properly be treated or even considered as a tacit admission of guilt, since knowledge of the right to stand silent is a sufficiently probative explanation for having failed to admit incriminating facts. But it does not follow that the right to invoke the privilege provides a sufficiently probative explanation for a failure to provide *exculpatory* information. Indeed, the fact

that a suspect is not *required* to speak during police interrogation does not mean that there is never any *advantage* to be gleaned from speaking. If the police have erred in arresting a suspect, and he can provide them with information that reveals their error to them, it is likely to appear and to be more advantageous for him to speak than to hold his tongue. While it is undoubtedly helpful for an accused to know that he need not speak if he does not wish to do so, the *Miranda* warnings were never intended to prevent an arrestee from providing information that he believes will aid the police in discovering that he is innocent. Nor were they intended to promote the belief that silence is always the best course.

There is no reason why the jury should be shielded from this normally probative information, nor any reason to presume that the jury will be unable to assess it properly and give it such probative weight as it deserves under the circumstances in assessing the truthfulness of a defendant's trial testimony. The words of Mr. Justice Frankfurter, concurring in *Adamson* v. *California,* 332 U.S. 46, 60–61, are especially pertinent here:

> Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process." * * * To deny that the jury can be trusted to make such discrimination [*i.e.,* assess the reasons for silence] is to show little confidence in the jury system.

The probative weight to be accorded any particular instance of silence will, of course, depend upon factors such as the relative ease of providing the information and the ease with which the police can discover its accuracy (we would expect, for example, that an accused would promptly reveal that he is not the person whom the police say they are seeking). It may also vary with the personal characteristics of the defendant—his age, experience in the criminal process, or personality—not to mention his demeanor while explaining the reasons for prior silence. But these are the kinds of factors traditionally entrusted to the jury in determining the credibility of a witness.

By the same token, there is no reason to suppose that, in assessing the credibility of a defendant's testimony, the jury will give this evidence so much greater probative weight than it deserves that he is impermissibly prejudiced thereby (particularly when, as here, the court provides an instruction cautioning the jury that the defendant is not required to give any explanation to the police). A defendant who is asked on cross-examination why he failed to give a similar explanation to the police has an opportunity to inform the jury of his motive for withholding the information, and there is no justification for assuming that the jury will not accord this secondary explanation its proper weight. "The value of such testimony, as is always the

ease with cross-examination, must depend upon the nature of the answers elicited; and their weight is for the jury." *Raffel, supra,* 271 U.S. at 498.

Indeed, the jury is often called upon to assess the credibility of a defendant's testimony by reference to evidence that may be deemed too prejudicial for use in the prosecution's case-in-chief, such as evidence of prior convictions, *Spencer* v. *Texas, supra,* 385 U.S. at 561, and evidence of the defendant's reputation for mendacity or bad character when character has been put in issue, 1 Wigmore, *Evidence,* §§ 58, 196 (McNaughton rev. ed. 1961). Even assuming, therefore, that the jury should be shielded from giving consideration, as evidence of guilt, to the fact that a defendant failed to give exculpatory evidence to the police, we see no reason to shield the jury from giving consideration to this circumstance as evidence bearing upon the truthfulness of the defendant's exculpatory testimony at trial.

In any event, even if considerations of due process might require that the jury be barred from considering such evidence in particular circumstances, where the trial court determines that its probative value is outweighed by its potentially prejudicial impact upon the jury, the decision to prohibit such a line of cross-examination should be within the discretion of the trial court:

> [M]any hundreds of potential relevancy issues passed before the trial judge. It is neither desirable nor possible for this court to lay down any general rule that will serve as a solution for every issue, for it is a different question of experience and common sense in each instance.

> * * * The precedents in the area of relevancy are of very limited value, and the trial judge must have wide discretion on the innumerable questions of relevancy before him. [*State* v. *Anderson,* 253 S.C. 168, 182, 169 S.E. 2d 706, 712, rehearing denied, 397 U.S. 1031. See also *United States* v. *Ravich,* 421 F. 2d 1196 (C.A. 2).]

See also ALI, Uniform Rules of Evidence, Rule 45; Fed. R. Evid. 403. The Fifth Amendment privilege is not so implicated, as a matter of course, that a *per se* rule barring such cross-examination is either necessary or desirable in order to avoid the possibility of undue prejudice.[16]

[16] This view is similar to that of the British Criminal Law Revision Committee. In its report presented to Parliament in 1972, the Committee recommended that it should be "permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defense which he puts forward at his trial." Criminal Law Revision Committee, Eleventh Report, Evidence (General) 16 (1972). Prior English law generally did not permit comment on a defendant's prior silence. See *id.* at 16–17; Cross, *Evidence,* 180 (1967). Under the Committee's recommendation, the suspect would retain the right to remain silent, but if he did so, that fact might be introduced at trial. It would be for the court or jury to determine if an adverse inference should be drawn from the defendant's prior omission. The Committee stated (at p. 21):

"In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defense which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice. * * *"

2. We submit that the circumstances that led the Court to bar the use of a defendant's prior invocation of the privilege before the grand jury as a means of discrediting his trial testimony in *Grunewald* v. *United States,* 353 U.S. 391, are readily distinguishable from, and inapplicable to, the case at bar. *Grunewald* rested on "the special circumstances" (*id.* at 425; Black, J., concurring) of a defendant whose invocation of the privilege in that "particular grand-jury proceeding" (*id.* at 423) was not at all inconsistent with his trial testimony, but was instead likely under the particular circumstances to have a prejudicial impact upon the jury, as is evident from the Court's unwillingness in that case to overrule *Raffel* and announce a new *per se* rule of inadmissibility, as the four concurring Justices would have done (*id.* at 426). The Court's inquiry proceeded no further than the threshold finding that the probative value of the particular invocation at issue was too small relative to its potential for prejudice (*id.* at 424):

> [I]n this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter.

With respect to the probative value portion of the equation, the Court stressed that the defendant's invocation of the privilege was not inconsistent with his testimony at trial. "Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless would have provided the Government with incriminating evidence from his own mouth" (*id.* at 421–422), since an unexplained admission before the grand jury that he knew one of the co-defendants would have linked him with a criminal conspiracy. *Id.* at 422. Its conclusion was "fortified" by the fact that the defendant had "repeatedly insisted before the grand jury that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel" (*ibid.*). Moreover, by the time he refused to answer the grand jury's questions, the grand jury had already heard testimony from his co-defendants, and "it was evident that [the defendant] was faced with the possibility of an early indictment." In these circumstances, the Court reasoned, "many innocent men who know that they are about to be indicted will refuse to help create a case against themselves * * *." *Id.* at 423.[17]

[17] The Court also noted, as factors rendering the claim of the privilege before the grand jury not probative on the verac-

Looking to the other side of the balance, the Court in *Grunewald* feared that knowledge that a defendant had refused to testify on the specific Fifth Amendment ground that his answers might tend to incriminate him would prejudice the jury against him, since it was likely that some jurors would equate an explicit assertion of the Fifth Amendment privilege with a confession of guilt. Moreover, the trial judge had refused to charge, as the defendant had requested, that "an innocent man may honestly claim that his answers may tend to incriminate him." *Id.* at 421, n. 32. "Weighing these factors," the Court concluded that it was prejudicial error for the trial court to permit cross-examination of the defendant on his invocation of the Fifth Amendment privilege before the grand jury. *Id.* at 424.

In considering the failure of a suspect to explain seemingly incriminating circumstances to the police, however, the balance between probative value and prejudicial impact swings solidly in the other direction. Here, had respondent explained to the police that his wife gave him the money found on his per-

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ity of trial testimony, certain characteristics of the grand jury proceeding, such as the absence of counsel, the inability to call witnesses, the lack of a right of cross-examination, and the secret nature of the proceedings. 353 U.S. at 422. Similar characteristics pertain to custodial questioning by the police. However, we submit that a fair reading of the *Grunewald* opinion demonstrates that those factors, standing alone, would not have been dispositive; they simply reinforced a result derived from other considerations affecting the weight that could reasonably be attached to the invocation of the privilege, considerations that are absent in the case at bar.

son, as he subsequently explained at trial, he would not have incriminated himself. Indeed, had the story checked out, respondent might have been released then and there from the criminal process. At the very least, the evidence of his possession of the money would not have been used against him at trial. Thus, there is good reason to suppose that, even after receiving *Miranda* warnings, he might well have offered such an explanation and neutralized the suspicion arising from that circumstance. Respondent's failure under these circumstances to explain the source of the money found on his person soon after the robbery therefore cast some real doubt upon the veracity of his subsequent explanation at trial.

Moreover, his interrogation occurred soon after he was apprehended—before he had any firm idea that evidence was being gathered against him and long before he "knew he was about to be indicted." Thus, unlike the defendant in *Grunewald,* respondent was not so far along in the criminal process that his refusal to provide an explanation was likely to reflect a tactical decision. On the contrary, respondent was interviewed at the start of the criminal process, when he could reasonably have expected that, had he provided sufficiently exculpatory information, he could have avoided the prosecution of the robbery charge against him.

At the same time, cross-examination in the instant case presented little chance of prejudice. The jury was not told that respondent had remained wholly silent before the police, nor that he had invoked his

Fifth Amendment privilege. Indeed, unlike a grand jury witness who must affirmatively invoke the privilege, an accused during police interrogation need never make such an affirmative invocation by asserting that his explanation might be self-incriminatory.

Moreover, the government's cross-examination merely disclosed that respondent had not explained to the police the circumstances surrounding his possession of the money. Respondent replied at trial that he had not offered the explanation to the police because "he didn't feel it was necessary at the time." The jury might infer from this colloquy that the defendant was not telling the truth about the source of the money. It is unlikely, however, that the jury would infer from this that he had remained silent before the police because he feared he would otherwise incriminate himself.

Finally, immediately following this colloquy, the district court—unlike the trial court in *Grunewald*—cautioned the jury (App. 5):

> He is not required to indicate where the money came from. There is no responsibility on his part in regard to that. * * * The defendant is not required to give any explanation whatsoever at the time of his arrest.

Had the jury any remaining doubt about the irrelevance of respondent's silence to the issue of his guilt, this instruction would have removed that potential for prejudice.

In summary, there is no reason in logic or policy for presuming that the jury is ill-equipped to assess

the probative weight of evidence showing that the defendant failed to give the exculpatory information he presents at trial to the police at the time of his arrest. None of the special circumstances of *Grunewald,* dealing with invocation of the privilege before the grand jury, are present with regard to the probative value, for purposes of the jury's assessment of the veracity of the defendant's trial testimony, of the fact that he previously failed to explain seemingly incriminating circumstances to the police.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals should be reversed.

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No. 74-364

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM G. HALE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-364

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM G. HALE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against self-incrimination which extends to custodial interrogation at the stationhouse gives the accused in a criminal case, innocent and guilty alike, the right to remain silent. The privilege also forbids comment on the exercise of the privilege because of the danger that the jury will draw the impermissible inference of guilt from silence. If, on the one hand, the accused has the right to remain silent but, on the other hand, the exercise of the right could be used to suggest his guilt, the privilege would be meaningless. It also is impermissible to comment on the defendant's silence at the stationhouse on cross-examination of the defendant at trial because the danger of the impermissible inference is present and is not likely to be eliminated by cautionary instructions. In addition, impeachment use of silence is improper because silence is perfectly consistent with the trial testimony of the accused and sheds no light on credibility. Silence at arrest is not inconsistent with the offer of exculpatory testimony by the defendant at his trial. Even an accused with the benefit of counsel might prefer to offer his testimony to a jury at trial rather than to the police at the stationhouse.

It is unfair for the government to warn the accused that he has the right to remain silent and that anything he says can be used against him, and to then use his silence to impeach his trial testimony. If silence could be used to impeach, the uncounseled accused at the stationhouse would be forced to choose between his right to remain silent and the full enjoyment of his

right to testify in his own defense at trial. Such a choice between competing constitutional rights is impermissible. In addition, the police would possess a tactic whereby they could secure incriminating "evidence" from the accused merely by asking him a question. If he responds, his inculpatory statements could be used to show guilt and his exculpatory statements could be used to impeach his trial testimony. If he does not respond, his silence could be used to impeach his trial testimony and suggest guilt. The government would be relieved of their burden to shoulder the entire load of the prosecution and the dignity of the accused would suffer. The defendant who testifies at his trial should not be deemed to have retroactively waived his right to remain silent at the stationhouse.

ARGUMENT

Legal scholars agree that one important reason for inclusion of the Fifth Amendment privilege against self-incrimination in the Constitution was the inquisitorial practices of the English Courts of Star Chamber and High Commission. *See* 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). In *Brown v. Walker*, 161 U.S. 591, 597 (1896), it is stated:

> But, however adopted, it [the privilege] has become firmly embedded in English, as well as American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right

> to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Two branches of the privilege have developed: the privilege of an accused in a criminal proceeding and the privilege of a witness. McCORMICK, EVIDENCE §116 (1972). The privilege of a witness, to invoke the privilege on a question by question basis, McCORMICK, EVIDENCE §§134-140 (1972), is not involved in the present case. We are here concerned with the privilege of an accused in a criminal proceeding which guarantees to him the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, . . . , for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The privilege may sometimes be "a shelter to the guilty" but it is also "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162 (1955). As stated in *Ullmann v. United States*, 350 U.S. 422, 426 (1956):

> Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. [footnote omitted].

And again in *Slochower v. Board of Education*, 350 U.S. 551, 557-558 (1956), it is stated:

> At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth

> Amendment. . . . The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.

There are many reasons why an innocent defendant may not want to testify in his defense. In discussing the federal statute which provides that no presumption can be drawn from the failure of a defendant to testify, the Court stated in *Wilson v. United States*, 149 U.S. 60, 66 (1893):

> It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any persumption against him.

There are two main policy reasons for the privilege as applied to the normal processes of criminal investigation

which the majority looked to, were: 1) Halperin maintained that he was innocent, 2) he was a compelled, and not a voluntary, witness, 3) he was not represented by counsel, 4) he could summon no witnesses, 5) he had no opportunity to cross-examine the witnesses testifying against him, 6) the proceeding was a secret one, and 7) he was already considered a potential defendant. The above circumstances are analogous to the situation of Mr. Hale at the stationhouse. Thus, it would seem that *Grunewald* would be controlling on the question of inconsistency and that under the circumstances of Hale's arrest, his exercise of the privilege was wholly consistent with innocence and was not inconsistent with his later trial testimony.

Having decided that Halperin's exercise of the privilege lacked probative value as an inconsistent statement or as inconsistent conduct, the Court then considered whether the introduction of the evidence was prejudicial. The Court concluded that there was a danger that the jury impermissibly used the testimony by equating the exercise of the privilege with guilt even though they were instructed by the judge that the evidence was relevant only to credibility. 385 U.S. at 424. Since there was prejudice with "grave constitutional overtones" the Court exercised its supervisory power over the administration of federal criminal justice to rule on the matter and reverse the judgment of conviction.

Hale's exercise of the privilege at the stationhouse lacked probative value as an inconsistent statement or

as inconsistent conduct.[9] The introduction of his evidence was also prejudicial. There was the same danger present in Hale's case as in Halperin's: that the jury impermissibly used the evidence by equating the silence of Mr. Hale at the stationhouse with guilt. The possibility that the jury will infer guilt from such silence even though they are instructed not to do so is certainly strong. *See Bruno v. United States*, 308 U.S. 287 (1939).

As Jerome Frank argued, the Fifth Amendment privilege has gotten an undeserved bad name. In the public mind, the explicit assertion of the privilege–like silence in reliance on the privilege–may be a badge of guilt. Bringing the defendant's silence before the jury, for any reason, will create the danger that they will infer guilt from his reliance on his constitutional right. *United States v. Grunewald*, 233 F.2d 566, 575 (2d Cir.

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[9]In addition to finding that the attempted impeachment was erroneous because potential prejudice outweighed probativity, the court below held that the error was harmful. The attempted curative instruction was inadequate, the court said, given "the weak testimony" of the complaining witness and "limited probity" of the other evidence against Mr. Hale. *United States v. Anderson*, 498 F.2d 1038, 1045 (D.C. Cir. 1974); Petition for Certiorari 13A. The question of the harmfulness of the error split the court below. *See* 498 F.2d at 1053-54; Petition for Certiorari 31A-33A (Wilkey, J., dissenting). The government has not sought review of that question in this Court. Petition for Certiorari n.2; Brief for the United States n.5. Hence, the government does "not rely here on any argument that the district court's caution to the jury was sufficient to obviate the error, if error there was." Petition for Certiorari n.1; Brief for the United States, n.4. *But see* Brief for the United States 54.

and prosecution today. See generally 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). One of these is that the privilege contributes toward "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), quoting from 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). *See Michigan v. Tucker*, 417 U.S. 433, 449 (1974); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Tehan v. Shott*, 382 U.S. 406, 415 (1966). The reason for requiring such a balance is "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy*, 378 U.S. at 55.

"[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and ... the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). It was also stated in *Malloy*, 378 U.S. at 8:

> [O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the simple expedient of compelling it from his own mouth.

The other major policy reason for the privilege is closely alligned to the first: the privilege prevents the eliciting of self-incriminating statements by inhumane treatment and abuses and respects "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'" *Murphy*, 378 U.S. at 55, quoting from

United States v. Grunewald, 233 F.2d 556, 581-582 (1956) (Frank, J., dissenting), *rev'd.* 353 U.S. 391. See *Tehan v. Shott*, 382 U.S. 406, 416 (1966). In terms of human dignity, the privilege "registers an important advance in the development of our liberty– 'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426 (1956), quoting from Griswold, THE FIFTH AMENDMENT TODAY 7 (1955). *See Miranda*, 384 U.S. at 360; *Commonwealth v. Dravecz*, 424 Pa. 582, 227 A2d 904 (1967). If an accused can:

> ... be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradiction, ... is ... painfully evident.... [*Brown v. Walker*, 161 U.S. 591, 596 (1896)].

Thus, self-incriminating statements have been viewed with distrust, *Murphy*, 378 U.S. at 55, and have been considered to be unreliable evidence. *See, e.g., Bram v. United States*, 168 U.S. 532 (1897). Indeed, the Court in *Escobedo v. Illinois*, 378 U.S. 478, 488-489 (1964), stated that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." [footnote omitted].

The privilege against self-incrimination also forbids comment on the exercise of the privilege. *Griffin v.*

California, *380 U.S. 609 (1965)*.[1] If the accused has the right to remain silent but the exercise of the right could be used to show his guilt, the privilege would be meaningless. As stated in *Griffin*, 380 U.S. at 614: "[C]omment on the refusal to testify is a remanant of the 'inquisitorial system of criminal justice.'" Citing from *Murphy*, 378 U.S. at 55.

The privilege of the accused to remain silent extends to interrogation at the police station as well as to the trial itself. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Bram v. United States*, 168 U.S. 532 (1897). The no comment rule also extends to silence at the stationhouse. *Miranda*, 384 U.S. at n. 37. *Miranda* established as procedural safeguards to protect the privilege, a series of warnings which must be given to the accused who is subjected to custodial interrogation. Unless these warnings are given and a waiver of the privilege is secured, any statements made by the accused will be excluded from evidence in his trial. The *Miranda* exclusionary rule exists as a deterent to police officers who might be tempted to violate the right of the

[1] Historically a defendant in a criminal proceeding was incompetent to testify in his defense. A federal statute, 18 U.S.C. §3481, provides that a defendant is competent to testify in his own defense and that no presumption can be drawn from his failure to testify. This provision has been interpreted to mean that comment on the defendant's silence is reversible error. *Wilson v. United States*, 149 U.S. 60 (1893). The Court did not face the constitutionality of commenting on silence until *Griffin* because the statute controlled federal cases and the Fifth Amendment privilege was not applied to the states until *Malloy v. Hogan*, 378 U.S. 1 (1964). *See Abramson v. California*, 332 U.S. 46 (1947).

accused to remain silent. See *Michigan v. Tucker*, 417 U.S. 433, 433-444 (1974). *Harris v. New York*, 401 U.S. 222 (1971), allows impeachment by statements made by the accused at the stationhouse, which are inconsistent with his trial testimony, even though the procedural safeguards of *Miranda* were not complied with.

The *Griffin* rule which would not allow comment at trial on the exercise of the privilege by the accused exists independently of *Miranda*. The introduction of evidence of silence would amount to a violation of the privilege itself. Such is the case here; the prosecutor impeached the trial testimony of Mr. Hale by referring to the fact that he chose to remain silent at the stationhouse.

In view of the fact that the privilege against self-incrimination and the no comment rule are involved in this case, it should be remembered that the privilege is not to be applied narrowly or begrudgingly, *Twining v. New Jersey*, 211 U.S. 78, 91 (1908); *Ullmann v. United States*, 350 U.S. 422, 426 (1956), for the privilege is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

I.

IMPEACHMENT OF A DEFENDANT WHO OFFERS EXCULPATORY TESTIMONY AT HIS TRIAL BY HIS SILENCE AT THE POLICE STATION AFTER HIS ARREST AND RECEIPT OF *MIRANDA* WARNINGS VIOLATES HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Silence of an accused at the police station following his arrest and receipt of Miranda warnings is not inconsistent with the accused's offer of exculpatory testimony at his trial and reference to that silence at trial is prejudicial.

When a defendant takes the stand at trial and testifies in his own defense, he may be impeached on cross-examination by matters which *relate to his credibility* as a witness even though those matters might not otherwise be brought to the jury's attention. Evidence of prior convictions, *Spencer v. Texas*, 385 U.S. 554 (1967), and character evidence, *Michelson v. United States*, 335 U.S. 469 (1948), may be brought out by the prosecutor to aid the jury in determining if the defendant is a truthful person. Narcotics unlawfully seized in a separate prosecution have been allowed to be used for impeaching a defendant when on direct examination he denied ever in his life having possessed narcotics. *Walder v. United States*, 347 U.S. 62 (1954). Statements made during police interrogation without proper *Miranda* warnings which are inconsistent with the defendant's testimony at trial can be used to impeach. *Harris v. New York*, 401 U.S. 222 (1971). It

is contended by the government in this case that Mr. Hale's silence at the police station is inconsistent with his exculpatory testimony at trial.

Mr. Hale had been identified on the street by the victim as one of the persons who robbed him (Tr.39), arrested for the robbery, taken into the police station, searched, and advised of his right to remain silent. (Tr.259). Mr. Hale was no stranger to police procedures, having been arrested on a previous occasion. (Tr.253-254). From the prosecutor's remarks at the bench (Appendix 5), it appears that Mr. Hale was asked by the police where he got the $158 he was carrying and whether he was working. Mr. Hale refused to reply to the questions: "He wouldn't say anything." Appendix 5. It is this silence which the government argues is inconsistent with Mr. Hale's trial testimony that he had received the money from his wife who had just cashed a welfare check and had asked him to purchase some money orders for her.

It is a uniformly recognized principle of evidence that the credibility of a person who takes the witness stand to testify may be impeached by the showing of a prior inconsistent statement made by the witness. McCORMICK, EVIDENCE §§34-37 (1972). Mr. Hale made no statement at the police station. The Federal Rules of Evidence, Rule 801(a), define "statement" as follows: "A 'statement' is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by him as an assertion." Even if Mr. Hale's silence is considered to be a statement or conduct, in order to use it for impeachment, it must be inconsistent. It must amount to an "assertion" contrary

to his later assertion at trial. A failure to assert a fact can only be considered an assertion of the non-existence of the fact if it would have been natural under the circumstances to assert the fact. 3 A WIGMORE, EVIDENCE §1042 (Chadbourn rev. 1972). The question thus becomes whether it would be natural for Mr. Hale to tell the police under the above stated circumstances that he received the money from his wife.

Similar considerations apply to the determination of whether silence can be used as a tacit admission (adoption of the statement of another by silence). *See* 4 WIGMORE, EVIDENCE §1071 (Chadbourn rev. (1972)); *see also United States v. Brinson*, 411 F.2d 1057 (6 Cir. 1969). Prior to the introduction into evidence of silence as a statement, it must be found that there was a confrontation or a statement which would under the circumstances naturally call for a reply.[2]

Many jurisidctions have adopted a "per se" rule that the arrest of an accused excludes evidence of a

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[2] *See* Note, "Tacit Criminal Admissions", 112 U.Penn.L.Rev. 210, 215-16 (1963), where it is stated:

> [C]ourts generally have imposed seven conditions for the introduction of evidence that an alleged admission by silence occurred. If silence is the only response by the defendant, the accusation must have occurred (1) in the defendant's presence and (2) within his hearing; (3) he must have understood it; (4) it ordinarily must have embraced facts within his personal knowledge; (5) he must have been physically able to speak and (6) psychologically at liberty to speak; and (7) the statement and surrounding circumstances must have naturally called for a reply. [Footnote omitted].

subsequent admission by silence.[3] As stated in *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18, 26 (1946):

> It is also apparent that when a person is in the hands of his accusers he may well and soundly conclude that his best interests will be served by silence, evasiveness, or equivocation. For this reason, in a number of jurisdictions it has been held that the mere fact of arrest is sufficient to render inadmissible the fact of the accused's failure to deny accusatory statements when made in his presence and hearing. These courts maintain that it is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent; that the maintenance of silence is the best strategic policy for one in the custody of the law, and that it is entirely consistent with innocence. [citations omitted].

In *Kelly v. United States*, 99 U.S. App. D.C. 13, 236 F.2d 746, 749 (1956), the court discussed some of the motives which might cause an accused under arrest to remain silent. The court quoted from the case of *State v. Hester*, 137 S.C. 145, 185, 134 S.E. 885, 898-899 (1926):

> [I]t cannot be disputed that many people, and even persons who are entirely innocent of wrongdoing, are afraid to talk in the presence of detectives. We must not forget, too, that from time immemorial it has generally been conceded an unwise thing for those charged with criminal offenses to talk to anybody and everybody about

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[3] 4 WIGMORE, EVIDENCE §1072 (Chadbourn rev. 1972); *Developments in the Law, Confessions*, 79 HARV.L.REV. 935, 1038 (1966).

their cases, and especially to engage in conversation with those who may not be friendly to them. For years and years the members of the bar have cautioned their clients not to discuss their cases with those with whom they come in contact, unless absolutely assured of their freindship, many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has beome a well-known fact to our people generally.

The court also quoted from the case of *O'Hearn v. State*, 79 Neb. 513, 522, 113 N.W. 130, 134 (1907):

> [T]he very surroundings of the accused in such cases are such as to render it entirely proper and natural for him to keep silent in the fear of misquotation or misconstruction. A person in such a situation would naturally fear that the worst possible interpretation would be placed upon his language, that the memories of those present would lean to statements prejudicial to his interests, and that an officer seeking to convict might supply through zeal any defect in the statement which was actually made.

As the above cases indicate, our citizens have long understood that it is best to remain silent when arrested whether they are innocent or guilty,[4] at least until

[4] As discussed in *Commonwealth v. Dravecz*, 424 Pa. 582, 227 A.2d 904, 907 (1967), many proverbs teach the wisdom of silence:

> Silence is Golden; Closed lips hurt no one, speaking may; Speech is of time, silence is of eternity; For words divide and rend, but silence is most noble till the end; And Silence like a poultice comes to heal the blows of sound; Be silent and safe, silence never betrays you.

Not mentioned but equally applicable is the proverb: "The toungue is the enemy of the neck."

there is an opportunity to confer with counsel. This is the prevalent advice given by counsel to their clients. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964), quoting from *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). In *Fowle v. United States*, 410 F.2d 48, 50 (9 Cir. 1969), the court observed:

> There are, however situations in which an accused is clearly under no duty to speak and where there are important reasons, regardless of guilt or innocence, for his maintaining silence. In such circumstances, since innocent and guilty alike may choose to stand mute, silence, even in the face of accusation, is highly ambiguous; hence, proof of such former silence should be excluded under universally recognized principles of evidence.

In addition to the fact of his arrest, Mr. Hale was specifically told by the police that he had a right to remain silent, that anything he said could be used against him, that he had the right to consult with a lawyer and to the presence of a lawyer during questioning, and that if he could not afford a lawyer, one would be appointed to represent him prior to any questioning. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Particularly in view of this warning, as an evidentiary matter, silence at the police station after his arrest is not inconsistent with Mr. Hale's offering of exculpatory testimony at his trial. There is simply no inconsistent statement or conduct for use as impeaching material. Mr. Hale was exercising or enjoying[5] his

[5] *See* Brief for United States, pages 25-26.

constitutional rights to remain silent and to consult with counsel. As *Miranda*, 384 U.S. at 475, makes clear, a valid waiver of these rights will not be presumed simply from silence; rather, there must be an express statement by the accused that he is willing to make a statement and that he does not want an attorney.[6]

As stated in *Fagundes v. United States*, 340 F.2d 673, 677 (1 Cir. 1965):

> When one takes the stand in his own defense he of course puts his credibility as a witness in issue. Nevertheless we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment. In the first place such evidence is ambiguous. Fagundes' words when arrested can as well be taken as indicating reliance upon constitutional rights as supporting an inference that his ability was an afterthought. There is nothing to indicate which interpretation is more probable.

And in *Johnson v. Patterson*, 475 F.2d 1066, 1068 (10 Cir. 1973), it was observed that:

> [S]ilence at the time of arrest is not an inconsistent or contradictory statement. Silence at

[6]The right to consult with counsel and have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment. *Miranda v. Arizona*, 384 U.S. 436, 469-470 (1966); *see also Maness v. Meyers*, ____ U.S. ____, ____, 95 S.Ct. 584, 595-596 (1975). If silence is viewed as a desire to speak with counsel before talking to the police, impeachment would be clearly inappropriate. *See, e.g., United States ex rel Macon v. Yeager*, 476 F.2d 613 (3 Cir. 1973); *Baker v. United States*, 357 F.2d 11 (5 Cir. 1966). Nor does the act of testifying in his own defense waive the earlier right to counsel at the stationhouse. *Cf. Loper v. Beto*, 405 U.S. 473 (1972).

> the time of arrest is simply the exercise of a constitutional right that all persons enjoy without qualification.

The above language in *Johnson* was quoted approvingly in *United States v. Anderson*, 498 F.2d 1038, 1042 (D.C. Cir. 1974), Petition for Certiorari 7 A.

In *Grunewald, v. United States*, 353 U.S. 391 (1957), a witness before a grand jury investigating corruption in the Bureau of Internal Revenue declined to answer a number of questions directed to him on the ground that the answers would tend to incriminate him.[7] The witness, Mr. Halperin, was later indicted for conspiracy to defraud the United States with reference to certain tax matters. At his trial, Mr. Halperin took the stand to testify in his defense. On cross-examination the prosecutor brought out for the purpose of impeachment the earlier invocation of the Fifth Amendment by the defendant on the subject matter to which he had just testified. The Court held that under the circumstances there presented, Halperin's exercise of the privilege was wholly consistent with innocence and that it was not inconsistent with his later trial testimony.[8] The circumstances in *Grunewald*, 353 U.S. at 422-423,

[7]A witness does not have the right to remain silent completely as does an accused. Rather, he must invoke the Fifth Amendment privilege against self-incrimination on a question by question basis. *See* McCORMICK, EVIDENCE §136 (1972).

[8]The four concurring Justices would not have looked to the circumstances of the case because of a belief that there are no special circumstances that would justify the use of a constitutional privilege to discredit a person who asserts it. 353 U.S. at 425.

1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)

This danger is drastically increased when the jury members are solemnly instructed that they may consider the defendant's prior silence in assessing his credibility. Even if they are instructed to consider the silence as impeachment evidence only, and not as evidence of guilt, they surely will draw the impermissible inference. The limiting instruction would tell them, in effect, that they could use the defendant's silence to conclude that he was lying when he said he was innocent but that they were forbidden from using it to find that he was guilty. This fine distinction is too much to ask a jury. "Certainly it is inconceivable that the average untrained jury could successfully perform such a feat of mental gymnastics." 233 F.2d at 573, *citing with approval*, Hinton, 21 ILL.L.REV. 396, 400 (1926).

As the California Supreme Court stated when disallowing the impeachment of a defendant by his invocation of the Fifth Amendment before a grand jury, in *People v. Sharer*, 61 Cal.2d 869, 395 P.2d 899, 905, 40 Cal.Rptr. 851 (1964):

> Even though [evidence of the defendant's invocation of the Fifth Amendment] was admitted for the limited purpose of impeachment, it became impossible for the jury to separate the "impeaching" nature of the evidence from the inference that defendant refused to answer because he was guilty. If the evidence did, in fact, impeach the testimony given at trial, it was only because the defendant was guilty as charged. One fact could not be true independently of the other.

> Such was more than impeachment. It was an attempt to produce indirect evidence of guilt. Viewed in that light, the evidence was not limited to impeachment, but constituted an implication of guilt, and so was inadmissible under all of the cases cited by the respondent.[10]

Analogous considerations are involved in *Stewart v. United States*, 366 U.S. 1 (1961), where the defendant was on trial for the third time for murder. He had been tried and convicted for the same offense twice before but on each occasion the conviction was reversed. At the third trial, unlike the first two, the defendant took the stand to testify in his own defense. The defense was insanity and his testimony was characterized by the Court as "gibberish without meaning." The prosecutor on cross-examination brought out the fact that the defendant had not testified in his previous two trials, exercising his right to remain silent. The Court held that there was no inconsistency between the prior silence and the testimony offered at trial, and that the question was prejudicial because the jury may have drawn any one of several possible adverse inferences: 1) that the defendant had elected to feign this testimony out of desperation brought on by his failure

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[10]In a similar context, this Court has recognized that a jury will not follow limiting instructions on the admissibility of an involuntary confession. *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964). In general, when a specific constitutional right is at stake a defendant must be protected against the possibility that the jury will disregard the instruction to consider a piece of evidence for a limited purpose only and not for guilt. *Compare Jackson* with *Spencer v. Texas*, 385 U.S. 554, 564-65 (1967); *cf. Loper v. Beto*, 405 U.S. 473, 482 n.11 (1972).

to gain acquittal in the two earlier trials, 2) that it was unlikely that a disease that had manifested itself only one out of three times at trial was active at the time of the homicide, or 3) that the defendant's failure to testify at his earlier trials indicated that his mental condition was worsening since the time of those trials and the homicide.[11]

The United States Courts of Appeals, who have considered the issue of whether silence at the time of arrest can be used to impeach a defendant who takes the stand at trial and offers exculpatory testimony, have, with the exception of the Third and Fifth Circuits, held that such impeachment is improper: a) D.C. Cir. - *United States v. Anderson*, 498 F.2d 1038 (D.C. Cir. 1974), Petition for Certiorari 1A; *Gillison v. United States*, 399 F.2d 586 (D.C. Cir. 1968); b) First Circuit - *Fagundes v. United States*, 340 F.2d 673 (1 Cir. 1965); c) Second Circuit - *United States v. Semensohn*, 421 F.2d 1206 (2 Cir. 1970); *See also United States v. Gross*, 276 F.2d 816 (2 Cir. 1960); d) Sixth Circuit - *United States v. Brinson*, 411 F.2d 1057 (6 Cir. 1969); e) Ninth Circuit- *Fowle v. United States*, 410 F.2d 48 (9 Cir. 1969); f) Tenth Circuit - *Deats v. Rodriquiz*, 477 F.2d 1023 (10 Cir. 1973); *Johnson v. Patterson*, 475 F.2d 1066 (10 Cir. 1973).

The Seventh and Eighth Circuits have not yet considered the issue and the Fourth Circuit has not

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[11]No cautionary instruction was given in *Stewart* and as the Court pointed out:

> [T]he danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's piror failure to testify. [366 U.S. at 10].

directly dealt with the issue. *See United States v. White*, 377 F.2d 908, 210-11 (4 Cir. 1967) which suggests such impeachment may be proper. *But cf., United States v. Ghiz*, 491 F.2d 599 (4 Cir. 1974).

The Third Circuit has twice considered the issue and their position is not entirely clear. *Agnellino v. New Jersey*, 493 F.2d 714 (3 Cir. 1974); *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3 Cir. 1973).[12]

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[12]In *Burt* the defendant was on trial for murder and his defense was that the shooting was accidental. The defendant had been arrested for breaking and entering some time after the shooting had occurred. At that time the police knew of no connection between Burt and the shooting and Burt never told them about the shooting. At the trial the prosecutor brought out on cross-examination that Burt never sought aid for the victim or told the police about the shooting. The per curiam opinion held that such impeachment was proper because the silence of Burt occurred prior to being accused of the crime. The two concurring judges felt that the silence at the police station was inconsistent with Burt's trial testimony and thus could be used to impeach that testimony.

In *Agnellino* the defendant was arrested for receiving stolen goods and his property was successfully searched for a variety of stolen goods. After receiving his *Miranda* warnings, the defendant made certain statements about the goods but did not say where he had obtained them. At trial the defendant testified that he had purchased the goods and the prosecutor commented on the defendant's failure to tell this to the police when he was arrested. The lead opinion held that such comment on credibility was permissible, relying on the concurring opinion in *Burt*. The other two judges on the panel each wrote concurring opinions, expressing their view that a comment on the defendant's silence, which would have been improper, was not involved in this case; rather, the impeachment was directed to the differences in the defendant's statements after his arrest and his testimony at trial. Chief Judge Seitz in his concurring opinion viewed *Burt* as a case which involved impeachment by the "non-action" of not seeking assistance for the victim rather than a case of impeachment by "non-speech."

The Fifth Circuit has considered the use of silence at the stationhouse to impeach exculpatory testimony on several occasions. *United States v. Fairchild*, 505 F.2d 1378 (5 Cir. 1975); *United States v. Quintana-Gomez*, 488 F.2d 1246 (5 Cir. 1974); *Unites States v. Ramirez*, 441 F.2d 950 (5 Cir. 1971); *Sharp v. United States*, 410 F.2d 969 (5 Cir. 1969). Such impeachment was found to be proper in *Quintana-Gomez, Ramirez,* and *Sharp*, but it was held improper in *Fairchild* which limits the holding in the earlier cases.[13]

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[13] *Quintana-Gomez* and *Ramirez* both involved the defense of duress: in the former case that others had forced the defendants to carry cocaine ashore and in the latter that strangers had forced the defendant to sell heroin. In *Fairchild*, the defendant was charged with transporting stolen cars across the state line. He testified at his trial that he had received the cars from a third person in what he believed to be a legitimate transaction. This exculpatory testimony was impeached by his silence at the stationhouse. The court found the impeachment improper, stating:

> We have held that, in extreme cases, silence following *Miranda* warnings can be the type of act which is inconsistent with certain exculpatory trial testimony. In such cases evidence of the silence is admissible.... But, to be admissible, keeping silence must be much more than ambiguous. It must appear to be an act blatantly inconsistent with the defendant's trial testimony. This will be the case when, as in *Ramirez* and *Quintana-Gomez*, the exculpatory testimony is of such a character that reasonable men would be left with the distinct impression that had it been true it would have been related to law enforcement authorities *even though* the defendant was specifically informed that he need not speak.... After Fairchild had been informed that he had the right not to speak until his lawyer was present he did what a reasonable man could be expected to do–he remained silent. [505 F.2d at 1382].

The Third and Fifth Circuits relied heavily on *Harris v. New York*, 401 U.S. 222 (1971), to justify impeachment of the defendant's trial testimony by his silence at the police station, as does the government in this case. That reliance is misplaced. The court held in *Harris* that a defendant could not remain free to offer perjurious testimony merely because his admittedly voluntary statements to police, which contradicted his testimony, had been given before he received the *Miranda* warnings. Two considerations underlie the *Harris* decision, and neither is present here. First, the *Miranda* exclusionary rule, which was the only bar to the admissibility of the defendant's statements, serves only to motivate the police to give the prescribed warnings, a purpose that would not be sacrificed if statements were let in for impeachment. 401 U.S. at 224; *see Michigan v. Tucker*, 417 U.S. 433 (1974); *People v. McColor*, 36 Mich. App. 455, 194 N.W.2d 99 (1972). More than a prophylactic rule is at stake in the present case. The defendant's Fifth Amendment right to remain silent is involved, because the no comment rule is an integral part of that right. *See Griffin v. California*, 380 U.S. 609, 614 (1965). Second, the impeachment evidence in *Harris* was an inconsistent statement which showed clearly that the defendant was prejuring himself, and it was the most convincing evidence of that fact. *See* 401 U.S. at 225. As discussed above, the defendant's silence at the stationhouse is not inconsistent and shows nothing about his truthfulness at trial. If the government believes that he perjured himself, it will need far more convincing evidence of that than the fact that the defendant remained silent when arrested.

In *Loper v. Beto*, 405 U.S. 473 (1972), the Court distinguished *Harris* for similar reasons. There the Court reversed a conviction because the credibility of the defendant, who had testified at trial, was impeached by his prior convictions even though the state obtained those convictions without respecting the defendant's right to counsel. The court noted that "[t]his is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand." 405 U.S. at 482 n. 11. Presumably, the court meant that Loper was not impeached for denying on direct examination the fact that he had been convicted for prior offenses. Similarly, the testimony that was impeached in the present case did not include an assertion that the defendant had told the police the source of his money.

The cases in the Third and Fifth Circuits, although they misapply *Harris*, can be harmonized with the D.C. Circuit decision in this case. Those cases allowed impeachment by evasive statements made by defendants at the time of arrest, *see Agnellino v. New Jersey*, 493 F.2d 714 (3 Cir. 1974), or blatantly inconsistent conduct before the defendant was accused of the crime in issue, *see United States ex rel Burt v. New Jersey*, 475 F.2d 234 (3 Cir. 1973), or blatantly inconsistent failure to explain the circumstances, *United States v. Quintana-Gomez*, 488 F.2d 1246 (5 Cir. 1974); *United States v. Ramirez*, 441 F.2d 950 (5 Cir. 1971); *see United States v. Fairchild*, 505 F.2d 1378 (1975).

B. The prejudicial effect of the evidence of the defendant's prior silence at the stationhouse violates the privilege against self-incrimination.

When the Court held that a defendant's trial testimony was improperly impeached by his invocation of the Fifth Amendment before a grand jury in *Grunewald v. United States*, 353 U.S. 391 (1957), it did so in the exercise of its "supervisory power" over "federal criminal justice", 353 U.S. at 424, because of the "grave constitutional overtones" of the issue presented. 353 U.S. at 423. As explained above, the court reasoned that the invocation of the privilege carried little probative weight and that that value was "far outweighed" by the possible prejudice to the defendant. 353 U.S. at 424. This reasoning runs parallel to the test ordinarily applied to determine the admissibility of a proposed piece of evidence. *See* Fed.R.Evid. 403. Yet the "constitutional overtones" of that case have become even graver since it was decided.

In an ordinary question of admissibility, the test of prejudice of proferred evidence is whether it "may unduly arouse the jury's emotions of prejudice, hostility, or sympathy." McCORMICK, EVIDENCE §185, at 439 (1972). The undue prejudice that the Court feared in *Grunewald* belonged to a special class. The Court wanted to avoid "the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt. . . ." 353 U.S. at 424. At the time that *Grunewald* was decided, it had not yet been declared that such impermissible use constituted a violation of the self-incrimination clause. The Court had previously held

that a presumption of wrong-doing from the invocation of the privilege could violate due process because it was irrational. *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), cited in *Grunewald* with approval, 353 U.S. at 421. Much earlier, the Court had held that a federal statute prohibited the inference of guilt from a defendant's failure to take the stand during his trial for violation of federal criminal law. *Wilson v. United States*, 149 U.S. 60 (1893); *see Griffin v. California*, 380 U.S. 609, 612 (1965) (*Wilson* is a statutory holding). Given this background, the *Grunewald* Court could hold, pursuant to its supervisory power, that the impeachment of Halperin was improper without necessarily holding that the impeachment was unconstitutional, as a violation of the self-incrimination clause.

Because *Wilson* settled the matter in federal courts, the Court was not called upon to decide whether the inference of guilt from the invocation of the privilege against self-incrimination violated the self-incrimination clause until that clause was declared enforceable against the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). In the term following the *Malloy* decision, the Court held that the privilege against self-incrimination is violated when the jury is permitted to infer guilt from the invocation of that privilege by the accused. *Griffin v. California*, 380 U.S. 609 (1965). *Griffin* elevated *Grunewald* to a constitutional holding because it declared that the impermissible inference that the *Grunewald* Court feared would be drawn if the impeachment were allowed, constituted a violation of the self-incrimination clause. In short, the impeachment was improper because it violated the "no-comment" rule.

The attempted impeachment in the present case, like the impeachment in *Grunewald*, had but little probative force. And like the impeachment in *Grunewald*, it prejudiced the defendant by allowing the jury to draw the impermissible inference of guilt from the invocation of the privilege against self-incrimination. Thus, under *Grunewald* and *Griffin*, the impeachment, of Mr. Hale's trial testimony constituted a violation of the privilege against self-incrimination.

II.

A DEFENDANT WHO TESTIFIES AT TRIAL DOES NOT RETROACTIVELY WAIVE HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT DURING CUSTODIAL INTERROGATION.

A. The right to remain silent at trial and the right to remain silent during custodial interrogation are severable rights.

" 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law." *Green v. United States*, 355 U.S. 184, 191 (1957). A defendant who voluntarily takes the stand at his trial necessarily waives his right to silence at that proceeding; the act of testifying constitutes the waiver. McCORMICK, EVIDENCE §132 (1972). In addition, he waives any right to conceal during cross-examination his knowledge of the facts in issue. *E.g., Fitzpatrick v. United States*, 178 U.S. 304 (1900). Because the defendant who takes the stand offers himself as a person who is innocent of

wrong-doing, *but cf. Stewart v. United States*, 366 U.S. 1 (1961), it is logical and constitutionally permissible for the jury to draw an inference of guilt from evasive or incomplete testimony. *See Caminetti v. United States*, 242 U.S. 470 (1917); *People v. Perez*, 65 Cal.2d 615, 422 P.2d 597, 55 Cal.Rptr. 909 (1967).

Such a "waiver" does not perforce extend back in time to a prior invocation of the right to remain silent. The right to remain silent during custodial interrogation is a distinct right from the right to remain silent during trial. The Court recognized that a defendant who testifies at trial does not by that act retroactively waive his prior reliance on the privilege against self-incrimination in *Leary v. United States*, 395 U.S. 6 (1969). The Court held Leary did not waive his Fifth Amendment challenge to the Marihuana Tax Act, 26 U.S.C. §§4741 et seq., when he took the stand and testified concerning the matters he asserted he could not be compelled to divulge under that Act's registration requirements. The Court observed that two distinct rights were involved. The right that Leary asserted was "not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." 395 U.S. at 28.

Other courts have used similar reasoning to find that a waiver of the Fifth Amendment privilege at one proceeding was not a waiver of the privilege at another. It has been held, for example, "that a witness . . . who testified to a matter before the grand jury did not thereby waive her right to claim her constitutional privilege against self-incrimination as to the same

subject matter when called as a witness in the subsequent trial of a person indicted by the Grand Jury." *In re Neff*, 206 F.2d 149, 152 (3 Cir. 1953). *See also United States v. Johnson*, 488 F.2d 1206, 1210 (1 Cir. 1973); *but see Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969). The Second Circuit has held that a witness who waived his Fifth Amendment privilege by making incriminating statements to the F.B.I. did not thereby waive his right to refuse to make the same statements before a grand jury because "a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding." *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958). *See United States v. Burch*, 490 F.2d 1300, 1303 (8 Cir. 1974). And this same principle will permit a witness to refuse to repeat answers he made to the same grand jury if there has been a substantial period of time between his two appearances and if the grand jury has in the meantime begun to investigate unrelated crimes. *Miranti*, 253 F.2d at 140. Similarly, a defendant who testifies in his own defense at trial cannot be impeached for his earlier silence at the preliminary hearing, *People v. Jordan*, 7 Mich. App. 28, 151 N.W.2d 242 (1967), nor by his invocation of the privilege when called as a witness in the earlier trial of a co-defendant, *Dean v. Commonwealth*, 209 Va. 666, 166 S.E.2d 228 (1969). *See also* the discussion of the severability of the right to remain silent at arrest and the right to remain silent at trial in *People v. Rolston*, 31 Mich. App. 200, 187 N.W.2d 454 (1971).

There is no sound reason why a defendant who elects to testify should be deemed to have waived his right to

remain silent during custodial interrogation.[14] The fact that a defendant maintained silence during custodial interrogation sheds no light on his credibility as a witness, at least on the facts of this case. *See* Argument I.A., *supra*. A defendant's assertion on the witness stand that he is innocent is "perfectly consistent" with his earlier desire not to talk to the police. *Cf. Leary v. United States*, 395 U.S. 6, 28 (1969). An uncounseled arrestee is entitled to maintain his silence at the stationhouse: because his statements, though consistent with his innocence, might provide evidence against him, *cf. Grunewald v. United States*, 353 U.S. 391, 421-22 (1957); because he fears that the coercive circumstances of custodial interrogation will cause him to misstate the facts or will result in a misinterpretation of his words, *cf. Miranda v. Arizona*, 384 U.S. 436, 466 (1966); because the arrestee realizes that unlike a subpoenaed witness, he is under no duty to speak, *United States v. Brinson*, 411 F.2d 1057, 1060 (6 Cir. 1969); or because he has been expressly warned that he has an absolute right to remain silent, *Miranda v. Arizona*, 384 U.S. 436, 468 (1966); *cf. Johnson v. United States*, 318 U.S. 189, 197 (1943). Preservation of these protections of the privilege against self-incrimination requires that an accused not be penalized for the exercise of his rights and not be compelled or encouraged to abandon the shield of silence. *Cf. Brooks v. Tennessee*, 406 U.S.

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[14] *See* Federal Rules of Evidence, Rule 608(b):

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

605, 611 n. 6 (1972); *United States v. Jackson*, 390 U.S. 570, 583 (1968).

B. The present case is not controlled by the Court's decision in Raffel v. United States, 271 U.S. 494 (1926).

In 1926 the Court held that the privilege against self-incrimination permitted certain impeachment by a defendant's invocation of his Fifth Amendment right. *Raffel v. United States*, 271 U.S. 494 (1926). At the defendant's first trial, a government agent testified, attributing an incriminating statement to the defendant, who did not take the stand to deny the attribution. The trial ended with a hung jury. When the defendant was retried, the agent repeated his testimony, but the defendant took the stand and denied having made the statement. The Court held that the Constitution was not violated when the government impeached his testimony at the second trial by the fact that he remained silent at the first.

Raffel, however, is not controlling in the present case. The *Raffel* Court observed that the rule it was adopting would not deter defendants at their first trial from remaining silent because the possibility of a second trial would then seem remote, and they would feel far greater pressure to testify at the first trial from the fact that the jury would observe their silence and could draw the impermissible inference of guilt from this observation. 271 U.S. at 489-499. The present case involves silence at the stationhouse followed by testimony at trial. There is less reason to find that

shedding the privilege at trial should mean forfeiting it at the stationhouse. A defendant who has just been arrested will be fully conscious of the very real possibility of a jury trial. Extension of the *Raffel* rule would thus create a significant pressure on the accused to speak at the stationhouse from fear that his silence will be used to impeach his testimony at his later trial. And the accused at the police station will experience no pressure comparable to the pressure to testify that a defendant at his first trial will feel from the fear that a jury will infer guilt from silence. Consequently, that pressure arising from the possibility of later impeachment will make a real difference at the stationhouse, while it is unlikely to play a significant role at a first trial.

The specific holding of *Raffel* was limited in *Stewart v. United States*, 366 U.S. 1 (1961), to situations in which a defendant at his first trial has failed to deny a statement that a witness has attributed to him but takes the stand at his second trial to deny making the statement. Otherwise there is no "specific testimony" to impeach by the defendant's prior silence, and the impeachment is impermissible as involving only "general credibility." 366 U.S. at 6, 7 n.14. The present case simply is not within *Raffel* as so limited. *See People v. Bobo*, 390 Mich. 355, 212 N.W.2d 190, 192 (1973).

In recent years the Court has not once followed *Raffel*. It has confined that case to its particular facts. In *Grunewald v. United States*, 353 U.S. 391 (1957), the Court unanimously refused to follow *Raffel* and held improper the impeachment of a defendant's trial testimony by his assertion of the privilege against self-incrimination before a grand jury. Four members of

the Court were prepared to declare *Raffel* overruled. 353 U.S. at 423 (Black, J., concurring). Five members of the Court, apparently preferring not to reach constitutional issues if other grounds for decision could be found, held the impeachment improper, finding that the trial testimony of the defendant was not sufficiently inconsistent with his prior invocation of the privilege, 353 U.S. at 420-22.

Again in *Stewart v. United States*, 366 U.S. 1 (1961), the Court did not follow *Raffel*. A defendant in a homicide prosecution, whose only defense was insanity, took the stand apparently in order to demonstrate his unsound mind. His testimony was incoherent. The government confronted him on cross-examination with the fact that he had not taken the stand at prior trials for the same offense. As in *Grunewald*, the Court held that there was no inconsistency between the prior silence and the testimony offered at trial. "There was no specific testimony to impeach." 366 U.S. at 6. Nor was the error harmless because the impeachment could have led the jury to infer that the defendant was feigning insanity or that he had developed a mental disease after the homicide. Three dissenting members of the Court apparently agreed generally with the majority's legal analysis but disagreed with the majority's reading of the record. 366 U.S. at 11 (Frankfurter, J.).

Raffel should be declared overruled. Indeed, it has been argued that *Raffel* was overruled a generation ago in *Johnson v. United States*, 318 U.S. 189 (1943). *See Grunewald v. United States*, 353 U.S. 391, 426 (1957) (Black J., concurring); *United States v. Grunewald*, 233 F.2d 556, 574-75 (2 Cir. 1956) (Frank, J., dissenting).

In addition to limiting *Raffel* to its own facts, the decision in *Stewart* implicitly overruled *Raffel* on all but its own facts. The cross-examination of Stewart's trial testimony was plainly probative because it undercut the inference that his counsel sought the jury to draw from listening to it, that Stewart was insane at the time of the crime. This probativity was the reason that the Court could find that the cross-examination was prejudicial, because it supported a rational inference that the insanity displayed on the witness stand was feigned or that it had developed only after the crime. 366 U.S. at 8-9. Even though there was no "contradiction" of the trial testimony in any literal sense, it is thus clear that the cross-examination rationally undercut Stewart's "testimony." Therefore, when the Court held that the cross-examination was improper the underlying reason must have been that it violated the privilege against self-incrimination. And a necessary assumption for this conclusion is that Stewart's act of taking the stand did not retroactively "waive" the protection of the Fifth Amendment as to his silence at his prior trials. Hence, unless prior silence is used to impeach some "specific testimony"–i.e., unless it is used to impeach a defendant's denial of a statement attributed to him, as in *Raffel–Stewart* suggests that there is no waiver of a prior invocation of the privilege.

Any life still lingering in *Raffel* expired after this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965). As asserted above, *Griffin* elevated *Grunewald* to a constitutional holding because the *Griffin* Court held that the inference of guilt from a defendant's invocation of the privilege is unconstitutional and

because the *Grunewald* Court had found the impeachment improper because just such an inference would be drawn. *See* Argument I.B., *supra*. For the same reason, *Griffin* implicitly overruled *Raffel*. Impeachment of the defendant in *Raffel*, like impeachment of the defendant in *Grunewald*, by his prior reliance on the privilege would permit the jury to use his exercise of a constitutional right not only to judge credibility but also to infer guilt. Under *Griffin*, impeachment of Raffel imposed an impermissible penalty on that right.[15] As suggested below, other recent cases striking down penalties on the exercise of constitutional rights require a finding that the impeachment in the present case was unconstitutional, *see* Argument IV, A and C *infra*, and for similar reasons they have implicitly overruled *Raffel*. *See, e.g., Brooks v. Tennessee*, 406 U.S. 605 (1972).

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[15]Prior to *Griffin*, this Court had not held that an inference of guilt from a defendant's failure to take the stand violated the privilege against self-incrimination. The Court had held that a federal statute prohibited such an inference in federal courts. *Wilson v. United States*, 149 U.S. 60 (1893). Significantly, *Raffel* fails to discuss or even to cite *Wilson*, probably because *Raffel* was decided at a time when the Supreme Court was "manifesting a marked hostility to the constitutional privilege and [was] severely modifying its scope." *United States v. Grunewald*, 233 F.2d 556, 577 (2 Cir. 1956) (Frank, J., dissenting). The *Raffel* Court said that it could "concede, without deciding," that unless a defendant testified, evidence of his prior silence "would be probative of no fact in issue, and would be inadmissible," 271 U.S. at 497, yet this "assumption" would seem to be compelled by the Court's holding in *Wilson*. It is thus open to substantial doubt whether *Raffel* is consistent even with *Wilson*. *See* 233 F.2d at 572-73.

III.

IT IS UNFAIR TO THE UNCOUNSELED ACCUSED WHO HAS BEEN GIVEN THE *MIRANDA* WARNINGS TO IMPEACH HIS TRIAL TESTIMONY WITH HIS SILENCE AT THE STATIONHOUSE.

An arrested accused is informed by the police that he has the right to remain silent, that anything he says can be used against him, that he has the right to consult with a lawyer and to the presence of a lawyer during questioning, and that if he cannot afford a lawyer, one will be appointed to represent him prior to any questioning. Allowing an accused who elects to exercise his rights and remain silent until he speaks with a lawyer, to be impeached with his silence when he takes the witness stand at trial is grossly unfair. The message that the police give the accused is not only that if he speaks, his words may be used against him, but also the converse–that if he remains silent, his silence will not be used against him. When an accused is told that he has the right to remain silent, the natural import of the warning is that his silence will not be used against him. It is an unnatural act[16] for the accused to talk after the police have told him that if he talks he may damage his case but if he keeps silent, he will not be penalized.[17]

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[16]*See generally* 8 WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961) 317.

[17]The *Miranda* warnings could be viewed as a promise by the police that the accused's silence won't be used against him. The accused may rely on that implied promise and remain silent. If that is the case and his silence is later used against him at trial

An uncounseled accused receiving the *Miranda* warnings will not understand them to mean that if he remains silent the prosecutor may bring that fact to the attention of a jury by impeacing the accused's trial testimony. This fact was recognized many years ago in *McCarthy v. United States*, 25 F.2d 298, 299 (6 Cir. 1928), where it was stated that if the silence of the accused was to be used against him, he should be warned: "If you say anything, it will be used against you; if you do not say anything, that will be used against you." This position has received recent support. *United States v. Anderson*, 498 F.2d 1038 (D.C. Cir.

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for impeachment purposes, the situation becomes analogous to the use of an involuntary confession for impeachment.

A confession may be involuntary because coerced by threats *or* by promises of leniency. *See* McCORMICK, EVIDENCE § 150 (1972). Even very slight promises made by the police may render a confession involuntary. *See Malloy v. Hogan*, 378 U.S. 1, 7 (1964); *Bram v. United States*, 168 U.S. 532 (1897). An involuntary confession cannot be used for purposes of impeachment because it is of questionable trustworthiness. *People v. Reed*, ____ Mich. ____, 224 N.W.2d 867, 872-873 (1975); *State v. Smith*, 242 Ore. 223, 408 P.2d 942, 944 (1965). In *Harris v. New York*, 401 U.S. 222, 224 (1971), the Court stated: "Petitioner makes no claim the statements made to the police were coerced or involuntary." *Harris* allowed statements secured without giving the *Miranda* warnings to be used for impeachment purposes "provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

The use of silence to impeach after an implied promise that it would not be used may be equivalent to the use of a statement to impeach after an implied promise that it would not be used. Such a statement may amount to an involuntary confession which could not be used to impeach. Silence should be treated the same.

1974), Petition for Certiorari I A; *Johnson v. Patterson*, 475 F.2d 1066 (10 Cir. 1973); *United States v. Brinson*, 411 F.2d 1057 (6 Cir. 1969); *Fowle v. United States*, 410 F.2d 48 (9 Cir. 1969).

Concern about the lack of a similar warning was involved in *Johnson v. United States*, 318 U.S. 189 (1943). In that case the defendant was on trial for income tax evasion during the years 1936 and 1937. The defendant, who took the stand in his defense, was asked on cross-examination about illegal sources of income in 1938. After he asserted his Fifth Amendment privilege the trial judge ruled that he need not answer the question, and the defendant refused to do so. However, in closing argument the prosecutor was allowed to comment on the exercise of the privilege insofar as it affected the credibility of the defendant. The Court stated:

> The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different than his apparent one. Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed against himself, he well might never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed . . . .

> . . . . The problem here is . . . . whether a procedure will be approved which deprives an accused on facts such as these of an intelligent choice between claiming or waiving his privilege. Knowledge that a failure to testify though permitted by the court would be submitted to a jury might seriously affect that choice. If the accused makes the choice without that knowledge, he may well be misled on one of the most important decisions in his defense. [318 U.S. at 197-199].

Similar considerations of fairness were involved in *People v. Ellis*, 65 Cal.2d 529, 421 P.2d 393, 55 Cal.Rptr. 385 (1966) where the accused, who was under arrest, prior to being placed in a lineup, was told that he had the right to remain silent and that anything he said could be used against him. When asked at the lineup to speak for a voice identification, he refused. This refusal was introduced into evidence to show a consciousness of guilt. In holding that it would be unfair to introduce evidence of the refusal to speak, the court stated:

> This warning did not distinguish between speech in terms of communication and speech for voice identification, between a refusal to speak free from sanctions and a refusal to speak productive of detrimental inference. That distinction would hardly occur to a layman unless it was called to his attention. Thus, defendant's refusal to speak might well have been the direct result of the police warning and cannot be used against him. . . . .
>
> . . . . After having given such a warning, if the police direct a defendant to speak for voice identification and he refused, they must, as a prerequisite to the use of the defendant's refusal to speak as evidence of consciousness of guilt,

advise him that the right to remain silent does not include the right to refuse to participate in such a test. [421 P.2d at 398-399].

Another reason why it would be unfair to introduce evidence of stationhouse silence to impeach the trial testimony of the accused is that the police would then possess a device that would allow them to elicit incriminating evidence from arrested and uncounseled innocent and guilty alike. *Cf.*, 87 HARV.L.REV. 882, 887, n. 34 (1974). The police would be in a position to tell persons they have arrested that unless they explain while they are in custody the incriminating circumstances that led to their arrest, no jury will believe their explanations at trial. In *Miranda*, the Court discussed coercive police tactics and noted that the police were instructed to engage in tactics similar to those described above. The Court observed that such tactics subverted the privilege against self-incrimination:

> The manuals also contain instructions for the police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:
>
> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."
>
> Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly. [384 U.S. at 454, citations omitted].

Indeed, such tactics are not very far removed from those employed by the Star Chamber and the High Commission. The accused, who has not yet been formally charged, is placed in a position where he is submitted to interrogation without the aid of counsel. If he answers the questions he risks incriminating himself and if he does not answer the question, his silence may be used against him. This danger is illustrated in the case of *People v. Sharer*, 61 Cal.2d 869, 395 P.2d 899, 40 Cal.Rptr. 851 (1964), where the accused was charged with assault with intent to commit murder. He was called before a grand jury investigating the crime and was asked whether he had committed the assault. He invoked his Fifth Amendment privilege and refused to answer the question. At his trial the defendant testified in his defense and was impeached by his prior refusal to answer. In holding the impeachment evidence inadmissible the Court discussed the effect of allowing such impeachment:

> If answers to such [questions by the grand jury] were refused on the ground of self-incrimination, the testimony at trial would necessarily be inconsistent. If answers were refused without statement of the privilege, that fact would be alleged as an adoptive admission. If the questions were answered, attempt would be made to use the answers to convict. Thus, the district attorney was knowingly placing the accused in a dilemma not contemplated by the law. Such procedure is suspect as a calculated trap whereby the prosecutor could force the accused to incriminate himself by the very refusal to do so. [395 P.2d at 905].

Thus, the rule the government seeks would at the very least relieve the government of its burden "to shoulder the entire load." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

The government argues that there is a benefit to the accused who is innocent to immediately tell the police his explanation of the suspicious circumstances that led to his arrest. Brief for the United States, 33. If he does so, the police can "independently verify" the suspect's account and will release him. A similar argument was raised in *Miranda* and the Court there stated:

> It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than

> without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.
>
> Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. [384 U.S. at 482].

In this case, Mr. Hale had been identified by the victim as one of the men who had robbed him and Mr. Hale had fled from the police. (Tr. 39-40) Assuming that Mr. Hale had told the police he received the money found on him from his wife, it is absurd to suggest that the police, even if they had verified this by speaking to Mrs. Hale, would have released Mr. Hale.

The government argues that modifying the *Miranda* warnings to include the information that if the accused remained silent, that fact can be used to impeach exculpatory testimony offered by the accused at trial, will confuse an accused about his constitutional rights. Brief for the United States, n. 14. Respondent agrees. Indeed, such a rule would make the right to counsel prior to questioning even more important than it is now.[18] In order to protect the accused's right to remain

---

[18]One can well imagine an innocent accused who is informed of the possible use of silence to impeach being compelled by that fact to reveal circumstances that, though consistent with his innocence, might constitute evidence against him or lead to the discovery of such evidence. Such compulsion is forbidden. *See Grunewald v. United States*, 353 U.S. 391, 421-22 (1957); *cf. Hoffman v. United States*, 341 U.S. 479, 486 (1951). For example, a person arrested for homicide who killed in self-defense should be free to maintain his silence during police custody. If he could be pressured into revealing the circumstances of the killing, his statements, though consistent with his innocence, would certainly be incriminating evidence. In addition,

silent and to insure fair treatment of the accused by the police at the stationhouse, the best policy would be to continue the *Miranda* warnings in their present form and disallow the impeachment use of defendant's silence.

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the excitement created by the arrest and the coercion inherent in custodial interrogation make it likely that an innocent defendant who is compelled to explain himself will misstep and either incriminate himself directly or contradict his later truthful testimony at trial. *See generally* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV.L.REV. 42 (1968). A further danger is that the police will misinterpret the words of the accused and testify inaccurately about what was actually said. Silence, on the other hand, is silence.

The rule the government seeks would also permit the police to coerce guilty defendants into confessing by exploiting their ignorance of the law and mistaken belief in their innocence. An example of such exploitation is described in *Escobedo v. Illinois*, 378 U.S. 478 (1964). Police in that case persuaded the accused during custodial interrogation that it would be to his advantage to pin the homicide in question on his companion, exploiting his ignorance of the fact that his "exculpating" statement made him fully liable as his companion's accessory. *See* 378 U.S. at 482-83, 486. One can imagine the police giving *Miranda* warnings but advising a defendant in Escobedo's position that unless he gave his full explanation to them, a jury would never believe his testimony at trial that his companion had held the gun.

IV.

IMPEACHING THE DEFENDANT'S TRIAL TESTIMONY BY HIS SILENCE IN THE FACE OF CUSTODIAL INTERROGATION IMPOSES AN IMPERMISSIBLE PENALTY ON HIS RIGHT TO REMAIN SILENT.

A. Allowing comment on the defendant's assertion of the privilege penalizes the privilege by making its assertion costly.

In *Griffin v. California*, 380 U.S. 609 (1965), the Court held that the Fifth Amendment privilege against self-incrimination was violated when a prosecutor argued that the defendant's silence at trial indicated his guilt and when the judge instructed the jury that they could draw this inference. Such comment is "a remnant of the 'inquisitorial system of criminal justice,'" "is a penalty imposed by the courts for exercising a constitutional privilege," and "cuts down on the privilege by making its assertion costly." 380 U.S. at 614. *See also Wilson v. United States*, 149 U.S. 60 (1893) (statutory "no comment" rule in federal prosecutions).

In *Miranda v. Arizona*, 384 U.S. 436 (1966) this Court held that the privilege against self-incrimination guaranteed the right of a defendant in a state prosecution to remain silent during custodial interrogation at the police stationhouse, thus applying to the states a rule that had long before been held applicable to the federal government. *Bram v. United States*, 168 U.S. 532 (1897); *see generally Michigan v. Tucker*, 417 U.S. 433, 441 and n. 15 (1974). As the *Miranda* Court

indicated, a necessary corollary of its holding was that the *Griffin* "no comment" rule must apply to silence at the stationhouse:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Cf. Griffin v. California*, 380 U.S. 609 (1965) [384 U.S. at 468 n. 37].

The "no comment" rule is, if anything, more important to the integrity of the privilege during custodial interrogation than at trial. A jury will be aware of the fact that a defendant has not testified even if it is not drawn to their attention. *Griffin v. California*, 380 U.S. 609, 621 (1965) (Stewart, J., dissenting). They possess the knowledge and the power to draw the impermissible inference of guilt from the defendant's silence even if they are instructed to ignore it. *See Bruno v. United States*, 308 U.S. 287, 293 (1939). In contrast, a jury will ordinarily have no way of knowing that a defendant was silent during custodial interrogation unless the prosecutor violates the no comment rule by introducing evidence on this fact.

Lower federal courts have uniformly held that a defendant's silence during custodial interrogation cannot constitutionally be admitted on the question of guilt. *E.g., United States v. Ghiz*, 491 F.2d 599 (4 Cir. 1974); *United States v. Kroslack*, 426 F.2d 1129 (7 Cir. 1970); *United States v. Arnold*, 425 F.2d 204 (10 Cir. 1970); *United States ex rel. Smith v. Brierly*, 384 F.2d 992 (3 Cir. 1967); *United States v. McKinney*, 379 F.2d 259

(6 Cir. 1967); *Helton v. United States*, 221 F.2d 338 (5 Cir. 1955); *United States v. Lo Biondo*, 135 F.2d 130 (2 Cir. 1943). There is no sufficient reason to make an exception for comment in the form of impeachment of a defendant's testimony at trial.

The defendant who takes the stand will suffer a penalty if the government is allowed to impeach his testimony by his silence during police interrogation, and this penalty is as heavy as the penalty a non-testifying defendant would suffer if the government used his prior silence in its case-in-chief.[19] Even if the judge instructs the jury that they may consider the silence only as impeachment evidence and not as evidence of guilt, there is the danger that the jury will draw the inference of guilt that was held unconstitutional in *Griffin*. *Grunewald v. United States*, 353 U.S. 391, 424 (1957); *see* Argument I.A. *supra*.

---

[19]In *Miranda*, the Court held that if the accused made statements during custodial interrogation without having been advised of his rights and without specifically waiving them, the statements must be excluded from use at trial whether exculpatory or inculpatory. It was stated at 384 U.S. at 477:

> In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used. . . .

If silence at arrest is used to impeach the defendant's trial testimony, it would "prove guilt by implication" though the silence in fact sheds no light on his credibility.

B. Allowing impeachment of a defendant's trial testimony by his silence at the stationhouse would put impermissible pressure on the privilege against self-incrimination at the time of arrest.[20]

If prosecutors are permitted to impeach defendants by their prior silence, and if juries are instructed that they may disbelieve a defendant's trial testimony merely because he was silent when arrested, then the right to testify at trial will be undercut. This right is protected by the Constitution and, in federal courts, by statute. *Ferguson v. Georgia,* 365 U.S. 570, 602-03 (1961) (Clark, J., concurring); 18 U.S.C. §3481 (1970).

The present case is analogous to *Brooks v. Tennessee,* 406 U.S. 605 (1972). In that case the Court held unconstitutional a state procedure that required a defendant to testify immediately after the close of the government's case, before he had presented any other evidence, or to forfeit his right to testify. 406 U.S. at 606. This procedure was infirm because it imposed a penalty on the defendant's exercise of his right to remain silent by depriving him of his right to testify. "[T]he Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right." 406 U.S. at 611 n.6. Although the Court recognized some state interest "in preventing testimonial influence," this was held insufficient to validate the penalty. 406 U.S. at 611. The

[20] *See generally Spevack v. Klein,* 385 U.S. 511 (1967); *Garrity v. New Jersey,* 385 U.S. 493 (1967); Argument III, *supra* at n. 18.

same interests are at stake in the present case. Here, too, the government is seeking to penalize a defendant for the exercise of his right to remain silent by depriving him of the full benefits of his right to testify. The defendant's Fifth Amendment interests at stake in the present case are, in fact, weightier than those at stake in *Brooks.* There the question was one of timing the decision to testify at trial; a defendant who could wait until the close of his case to decide whether or not to testify could better judge the tactical advantages than could a defendant who was required to make this decision before he learned how well the rest of his case had gone. *See* 406 U.S. at 609. If the government obtains the rule it seeks in the present case, then a defendant who seeks to preserve his full right to testify at trial will have to provide the government, at the time of his arrest, with information that will relieve it of its burden "to shoulder the entire load," and will have to surrender his right to silence insofar as it is "a protection to the innocent." *See Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964). In addition, this decision at the stationhouse must be made without "the guiding hand of counsel." *Cf. Escobedo v. Illinois,* 378 U.S. 478, 486 (1964).

Another analogy can be found in this Court's decision in *Loper v. Beto,* 405 U.S. 473 (1972). There the Court reversed a conviction because the defendant's trial testimony was impeached by his prior convictions, although the state had obtained those convictions at a trial in which the defendant was denied his right to counsel. 405 U.S. at 474-77; *see Gideon v. Wainwright,* 372 U.S. 335 (1963). There the government benefited from the fact that it had denied a defendant his

constitutional right to counsel, *see* 405 U.S. at 482; here the government exploited the fact that the defendant exercised his constitutional right to silence. There, the impeachment evidence was unreliable because the convictions had been obtained without counsel, 405 U.S. at 483-84; here the impeachment evidence was unreliable because the defendant was silent in the exercise of constitutional rights that he had been specifically told he could assert.

C. Permitting impeachment of a defendant's trial testimony by his silence at the time of his arrest would unconstitutionally require the defendant to elect between constitutional rights.

If a defendant testifies at a motion to suppress evidence allegedly seized in violation of the Fourth Amendment, the government is barred from using this testimony against him at trial because if such use were allowed, a defendant would be required to choose between his Fourth and Fifth Amendment rights: he could not exercise both. *Simmons v. United States*, 390 U.S. 377, 392 (1968). *See also United States v. Carignan*, 342 U.S. 36, 38 (1951) (defendant has right to testify outside jury's presence on motion to suppress confession); *cf. Jackson v. Denno*, 378 U.S. 368, 389 n. 16 (1964). Similarly, a parolee must be permitted the opportunity to speak on his own behalf at his revocation hearing without the fear that the government will use his statement against him in a subsequent trial. *Melson v. Sard*, 402 F.2d 653, 655 (D.C. Cir. 1968).

And the government may not use the substance of a defendant's testimony in support of an application to obtain appointed counsel against him at trial because such use would require an unconstitutional election between Fifth and Sixth Amendment rights. *United States v. Branker*, 418 F.2d 378, 381 (2 Cir. 1969). Nor can the Eighth Amendment right to bail be made contingent on a waiver of the Fifth Amendment privilege against self-incrimination. *Cf. Noto v. United States*, 76 S.Ct. 255 (Harlan, Circuit Justice, 1955). The defendant in the present case exercised his Fifth Amendment right to remain silent. The government's attempted impeachment denied him the full enjoyment of his due process right to testify on his own behalf. *See Ferguson v. Georgia*, 365 U.S. 570, 602-03 (1961) (Clark, J., concurring). If such impeachment is permitted, then defendants will be required to choose between rights: they can enjoy the right to testify at trial or the right to remain silent at the stationhouse, but they cannot exercise both fully. The Court held just such a choice unconstitutional in *Brooks v. Tennessee*, 406 U.S. 605 (1972).

A contrary result is not required by the Court's decision in *McGautha v. California*, 402 U.S. 183 (1971). There the Court held that the Constitution did not require the state of Ohio to hold a bifurcated trial in capital cases where juries were allowed to fix punishment at life imprisonment or death. The defendant Crampton argued that a unitary trial compelled him to choose between his right to remain silent on the question of guilt and his asserted due process right to address the jury personally on the question of punishment. 402 U.S. at 208-09. The most

salient difference between this case and *McGautha* is that the rule the defendant seeks in this case would not put any burden on the state judicial systems. This difference is one reason that the *McGautha* Court did not deem *Simmons* controlling and chose not to follow *United States v. Jackson*, 390 U.S. 570 (1968). The *Jackson* Court held unconstitutional a federal kidnapping act that permitted a defendant who was convicted after trial by jury to be put to death but imposed a maximum punishment of life imprisonment on a defendant who pled guilty or who waived his right to a jury trial and was convicted by the court. *See* 390 U.S. 581. This procedure violated a defendant's Sixth Amendment right to trial by jury and Fifth Amendment right not to be compelled to plead guilty. The procedure's effect was "to chill the assertion of constitutional rights by penalizing those who choose to exercise them" and to "impose an impermissible burden" on a defendant's right by "needlessly *encourag[ing]*" guilty pleas. 390 U.S. at 581, 583 (emphasis in original). The primary distinction between *McGautha* and *Jackson* seems to be that the latter, like *Simmons*, would not require radial surgery on state court procedures. Instead of following *Simmons*, *McGautha* followed *Spencer v. Texas*, 385 U.S. 554 (1967). Like Crampton the defendant in *Spencer* unsuccessfully sought to impose a system of bifurcated trials on the states, *see* 385 U.S. at 562, by withholding from the jury information of prior convictions, to be used in sentencing, until the jury returned a verdict on the question of guilt.

The *McGautha* Court stated that the "threshold question" concerning the validity of a requirement that

a defendant choose between constitutional rights was "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." 402 U.S. at 213. The election Crampton was required to make survived this test because it was virtually indistinguishable from many other tactical decisions that must be made at trial. The pressure on a defendant to take the stand because of his desire to speak on the issue of punishment is much like the pressure a defendant will feel to testify because of the force of the government's case against him. 402 U.S. at 213. And the pressure a defendant will feel to forego the opportunity to speak on punishment is like the pressure a defendant will feel to avoid testifying on guilt because of the possibility of damaging cross-examination and impeachment and because the testimony might mean waiver of his motion for judgment of acquittal. 402 U.S. at 214-15. The choice that the government would require a defendant to make in the present case cannot be analogized to such decisions of trial tactics. The defendant in this case had just been arrested, was in police custody at the stationhouse, and was unrepresented by counsel. The government has conceded that the defendant could make no such tactical choice; awareness of the factors involved in the choice the government would require him to make would, the government asserts, merely "tend to confuse an arrestee about his constitutional rights . . . ." Brief for the United States at 39 n. 14.

The fact of the matter is that the defendant in the present case made no election to compromise his right to testify at trial when he remained silent at the stationhouse after he was warned of his right to silence

and that any statement could be used against him. Appendix 4. He remained silent without any warning that this silence would compromise his right to testify. Under the doctrine of *Johnson v. United States*, 318 U.S. 189 (1943), it was improper to impeach the defendant's trail testimony by the fact that he exercised a right that he had been officially told he could exercise, even if such impeachment would have been proper had the defendant been warned of this consequence of his decision to exercise the right. It is no answer to argue that an uncounseled arrestee was in no position to make an intelligent choice about his options even if they had been accurately described to him. *See* Brief for the United States at 39-40. If the decision is unfair under *Johnson* when a defendant who is guided by counsel is required to make it, the fact that a defendant is unrepresented and under arrest certainly cannot render it fair.

Assuming that the defendant in the present case was compelled to choose between his right to silence and an undiluted right to testify at trial, the controlling case is not *McGautha* but *Brooks v. Tennessee*, 406 U.S. 605 (1972). The same rights were involved in *Brooks*. The Court held that a defendant could not constitutionally be compelled to choose between his right to remain silent and his right to testify. 406 U.S. at 610-11.

D. The police have no right to take "discovery" from an uncounseled accused and the impeachment of the defendant in this case cannot be justified as a sanction imposed for his failure to provide discovery.

The Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970), cannot be distorted to justify impeachment

of a defendant's trial testimony if he remains silent during custodial interrogation. The *Williams* Court held that a defendant was not constitutionally compelled to incriminate himself merely because he complied with a state notice-of-alibi rule out of fear that non-compliance would mean exclusion of his alibi evidence at trial. *See* 399 U.S. at 79-80.[21] The rule required that on written demand defendant's counsel provide the prosecution with the particulars of the alibi defense, including the names and addresses of alibi witnesses. The government was required to reciprocate with ample discovery of its case. 399 U.S. at 79. This procedure, said the Court, produced no compulsion within the meaning of the Fifth Amendment because the choice a defendant was required to make was perfectly analogous to choices he was required to make at trial. The act of putting alibi witnesses on the stand notifies the government of who these witnesses are and provides investigatory leads. Only the timing was accelerated. 399 U.S. at 84-85.

In the present case, the government is seeking to require a defendant to submit himself personally to custodial interrogation or suffer a sanction for thus refusing "discovery." This requirement would be a far cry from the acceleration of trial processes at issue in *Williams*. In addition, the advantage the government received would be unbalanced by any reciprocal discovery right due the defendant. In a later case, the Court unanimously held unconstitutional a state

[21] The Court has specifically reserved the question of whether an otherwise valid discovery order may be enforced by excluding a defendant's trial testimony. *Wardius v. Oregon*, 412 U.S. 470, 472 n.4 (1973). *Cf. Williams v. Florida*, 399 U.S. 78, 83 n. 14 (1970).

discovery procedure that required the defendant to disclose his case to the government but gave the defense no reciprocal discovery right. *See Wardius v. Oregon*, 412 U.S. 470 (1973). The defendant in that case failed to comply with a state notice-of-alibi statute and was precluded from presenting alibi witnesses or from himself testifying on his alibi. 412 U.S. at 473. Mr. Justice Marshall, speaking for seven members of the Court, said that the lack of reciprocity violated the due process clause even if valid objectives could be reached under a balanced discovery scheme:

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

412 U.S. at 475-76 (footnote omitted). The defense in the present case had no opportunity to discover the government's case against the defendant that would be analogous to the right the government asserts to discover anticipated defenses through custodial interrogation of the defendant. The "discovery" right the government asserts would, therefore, deny due process of law.

The government's attempt to analogize this case to *McGautha* or *Williams*, as a case involving "the accused's inherent need to make tactical judgments about the conduct of his defense," Brief for the United States at 32, or the defendant's need to weigh the

"strategic disadvantages at trial" from his course of conduct, *Id.* at 36, ignores the fact that Mr. Hale was under arrest and without counsel at the time the government would require him to decide how he would conduct his defense. The government would require a defendant to be "immersed in the intricacies of substantive and procedural criminal law," *see Kirby v. Illinois*, 406 U.S. 682, 689 (1972), before the formal initiation of a criminal prosecution and before appointment of counsel, though clearly after the time the police decided to seek prosecution. The failure to comply with the police demand for discovery would undercut the defendant's right to testify, yet the Court has long recognized that a defendant cannot be required to make a decision about that right without counsel's advice. *See Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); *Ferguson v. Georgia*, 365 U.S. 570, 594-96 (1961)[22] It would therefore be improper to require a defendant to make such strategic choices at the stationhouse.

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[22]Because a defendant's right to testify at his trial is among "those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial," "any alleged waiver must meet the strict standard of an intentional relinquishment of a 'known' right." *See Schneckloth v. Bustamonte*, 412 U.S. 218, 236-237 (1973).

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM G. HALE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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WILLIAM G. HALE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

This brief, *amicus curiae,* is filed pursuant to the rules of this court. The Solicitor General of the United States, counsel for the petitioner, and Professor Larry Ritchie, counsel for the respondent have consented to the filing of the brief. Letters to this effect have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The interest of *amicus* in the instant case stems from the fact that if the majority opinion of the lower court is allowed to stand in this case, the result could be a perversion of the privilege against self-incrimination to the effect that a criminal defendant who takes the witness stand will have the opportunity to commit perjury, as to matters on which he previously stood mute, without challenge to his credibility on the matter by the prosecution. We believe that such a situation would be extremely detrimental to the effectiveness of law enforcement and, indeed, to the integrity of the judicial process.

ARGUMENT.

I.

THE PRIVILEGE AGAINST SELF INCRIMINATION SHOULD NOT BE PERVERTED BY PRESENTING DEFENDANTS WHO TESTIFY IN THEIR OWN BEHALF IN CRIMINAL CASES WITH THE OPPORTUNITY TO COMMIT PERJURY WITHOUT CHALLENGE TO THEIR CREDIBILITY WITH REGARD TO PRIOR SILENCE AS TO IMPORTANT ISSUES IN THE CASE.

Amicus will not reiterate the legal arguments made by the United States in the instant case, although we are in complete agreement with them and wish to associate ourselves with them. We will, however, discuss briefly that aspect of this case which we believe to be of the most crucial importance to the effectiveness of the enforcement of the criminal law and, indeed, to the integrity of the entire judicial process.

This aspect of the instant case concerns the fact that, if the reasoning of the majority judges below is to be followed, the privilege against self-incrimination embodied in the Fifth Amendment to the Constitution of the United States could become, in effect, a license for a criminal defendant to commit perjury at will while the prosecution, at the same time, is barred from making any effective challenge to it. This, in the words of Judge Wilkey, dissenting in the instant case, would result in ". . . an incredible perversion of the judicial process."[1]

Amicus has, on a prior occasion, made known to this Court its view that the restrictions upon law enforcement in obtaining legally admissible statements which are embodied in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), are too rigid and inflexible and

1. 498 F. 2d 1038 (1974), at page 1049.

that they should be modified.[2] Indeed, we submit that the very rigidity and inflexibility of the language contained in a *footnote* to the *Miranda* opinion was a major factor in the decision of the majority in the instant case.[3] The instant case does not present the occasion for a full scale review of the *Miranda* decision and we will not belabor the point; we merely point out that it is the inflexibility of the *Miranda* decision which has, at least in part, caused this case to arise.

Basically, the issue here can be summarized thusly: can a suspect in a criminal case invoke, at least by implication, his privilege against self-incrimination by standing mute in the face of police interrogation and then be given the opportunity at trial to commit perjury over the issue on which he so stood mute without the prosecution having an equal opportunity to challenge the credibility of the trial testimony in question?

We emphasize the point that the issue here concerns merely the *opportunity* to commit perjury. We cannot say whether or not defendant Hale did commit perjury when he took the stand and explained his possession of a large sum of money, on which he had stood mute at the police station, by the story that he had money from his wife to buy money orders. It is precisely the fact that we cannot tell whether the defendant is telling the truth that makes the issue so important, because it then devolves upon the jury to determine whether the defendant's statement is credible or not. If the prosecution is not permitted to challenge a given statement by asking a defendant who has taken the stand whether

2. See: Brief *Amici Curiae* of Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc. in *Michigan* v. *Tucker*, ... U. S. ....., 94 S. Ct. 2357 (1974).

3. 384 U. S. 436 at 468, N. 37. The footnoted language in *Miranda* which the majority below found to be so compelling is as follows:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

he said nothing about the matter on prior occasions, the jury will be denied the opportunity to accept or reject the very proper inference that an exculpatory statement made by the defendant at trial was fabricated during the interval between the time of his first questioning, when he said nothing, and the time of his trial when he takes the witness stand.[4]

If the reasoning of the majority in this case is allowed to stand the privilege against self-incrimination will have become perverted from a shield against the extortion of involuntary confessions from criminal suspects by the police into a device whereby the defendant can, with legal impunity, assert the privilege by standing mute and then testify, perhaps perjuriously, in his own behalf without the opportunity of the prosecution to challenge, by reference to the prior silence, the credibility of the defendant's assertions in his own behalf.

This "perversion of the privilege" rationale is brought into focus in the context of the instant case. Defendant had been identified by the complaining witness as one of the men who had robbed him. He was arrested and questioned by the police after being advised of his rights. He had on his person the sum of $150.00. The record is unclear as to whether the police specifically asked him about the money; the record is clear, however, that the defendant did not indicate in any manner to the police where the money came from.

The position of the defendant is summed up in an opinion of the Kansas Supreme Court, upholding a jury instruction that an inference may arise from a defendant's failure to procure testi-

4. In the instant case it is reasonable to believe that the jury, by its guilty verdict, may have made just such an adverse inference against the defendant. Indeed, the majority seems to concede this in footnote one to its opinion:

> Both appellants argue that the trial court's refusal to grant a motion for judgment of acquittal was erroneous since the testimony of the complaining witness was "inherently incredible." We find sufficient evidence to sustain the verdicts. *The question of credibility was for the jury.* (Citations omitted) (emphasis supplied) 498 F. 2d 1038 at 1039, fn. 1.

mony which would refute or explain facts and circumstances of a suspicious nature which were within the defendant's knowledge and reach:

> *"It seems to us that that clause is only a recognition of a well-understood principle of human action. The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever then a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Will not a man, who can, explain that which unexplained will stamp him a criminal and consign him to the felon's cell? The criminal law furnishes in its rules more than one illustration of this principle. The possession of recently-stolen property casts upon the possessor the duty of explaining such possession. Why? Because the fact and manner of acquiring that possession are peculiarly within his knowledge and reach, and the instinct of self-preservation will compel him to give an explanation thereof consistent with his innocence, if any such explanation exists. Other illustrations might be cited, but it is scarcely necessary. The principle itself rests in the common knowledge and conviction of all." State* v. *Grebe,* 17 Kan. 458 (1877). Cited in 2 Wigmore Sec. 285, 3rd Edition (1940).

We submit that this very commonsense rationale applies to the instant case.

We do not contend that the police could have forced the defendant to explain where he got the money. We do contend, however, that the inference of unexplained possession as described above should not be denied to the jury, in order to assess the defendant's credibility, once the defendant had taken the stand and given an exculpatory explanation of his possession of the money. Any other holding perverts the legitimate as-

sertion of the privilege into an affirmative weapon for the defendant to use in committing perjury, if he so desires, with impunity. This does nothing to serve the cause of justice and indeed it undermines the integrity of the entire judicial process.

The obvious policy reasons against permitting the privilege against self-incrimination to become so perverted are underscored by the decisions of this Court in recent years. In *Harris* v. *New York,* 401 U. S. 222 (1971), it was held that statements taken from an arrested criminal suspect in violation of *Miranda,* although inadmissible in the prosecution's case in chief, were admissible for use in cross-examination in order to challenge the credibility of the defendant who had taken the witness stand and made contradictory statements. The Chief Justice stated the Court's position with regard to the "perversion of the privilege" issue:

> *The shield provided by Miranda cannot be perverted into a license to use perjury by way of defense, free from risk of confrontation with prior inconsistent utterances.* 401 U. S. 225 at page 226.

More recently this Court again refused to allow the privilege to be perverted in *Michigan* v. *Tucker,* ..... U. S. ....., 94 S. Ct. 2357 (1974). In that case the police had arrested a rape suspect and taken a statement from him in violation of the dictates of *Miranda* v. *Arizona.*[5] The suspect, Tucker, made a statement in which he gave the police a totally false alibi story to the effect that he had been hunting with one Henderson when the rape took place. Not only did Henderson not confirm Tucker's story but he was called as a witness at Tucker's trial and gave extremely damaging testimony against Tucker.

The Michigan Supreme Court affirmed Tucker's conviction;[6] however, the United States District Court for the Eastern Dis-

5. In fact *Miranda* had not been decided when Tucker was questioned; however since the statements were made pre-*Miranda* but Tucker's trial was post-*Miranda,* the *Miranda* rule applied. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

6. 385 Mich. 594 (1969).

trict of Michigan held, in *habeas corpus* proceedings, that Henderson's testimony, which was concededly a product of Tucker's "illegal" statements, was the fruit of the poisonous tree and thus inadmissible.[7] The United States Court of Appeals for the Sixth Circuit affirmed.[8] The lower Federal Court decisions are classic examples of the perversion of the privilege theory. They held in effect that Tucker was privileged to lie to the police as much as he pleased, with complete impunity from the consequences of his lies because *Miranda* had been violated. This Court reversed, holding that the testimony of the third-party witness, Henderson, was admissible despite the fact that it was the product of statements taken from Tucker in violation of *Miranda*. Again as in *Harris, supra,* this Court refused to pervert the privilege against self-incrimination into a license for the defendant to use his own false statements to his advantage.

We submit that the holdings of *Harris* and *Tucker, supra,* should be applied in the instant case as well. Mr. Justice Brennan, dissenting in *Harris* stated his view that ". . . it is monstrous that courts should aid or abet the law-breaking police officer."[9] *Amicus* believes that it is far more monstrous and far more corrosive to the integrity of the administration of justice to aid and abet criminal defendants by giving them every opportunity to make false statements or to commit perjury with impunity from the consequences of making the false statements or of committing perjury.

For these reasons we respectfully urge that the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed.

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7. 352 F. Supp. 266 (1972).
8. 480 F. 2d 927 (1973).
9. 401 U. S. 222 at page 232.

CONCLUSION.

The holding of the lower court squarely presents an example of the perversion of the privilege against self-incrimination. Defendant was under no obligation to explain to the police why he was in possession of $150.00 at the time of his arrest for robbery, and he was so advised. But when the defendant took the witness stand at his trial and gave an exculpatory explanation for his possession of the money, the jury should not have been denied the opportunity to accept or reject any inferences it might make from defendant's prior unexplained possession.

Any other holding would present the defendant with the opportunity to commit perjury without risk of a challenge, by the prosecution, to his credibility. The teachings of this Court in *Harris* and *Tucker, supra,* are persuasive authority for the proposition that the Court will not countenance such a perversion of the privilege against self-incrimination. The holding of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RECEIVED
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SUPREME COURT, U.S.

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, William G. Hale, asks leave to proceed in forma pauperis and to file a single typewritten copy of Respondent's Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the District of Columbia Circuit, pursuant to Rule 53.

The affidavit of petitioner's counsel in support of this motion is attached hereto.

Larry J. Ritchie

LARRY J. RITCHIE
Counsel for Respondent
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)
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Washington, D. C. 20001

BEST COPY AVAILABLE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

I, Larry J. Ritchie, being first duly sworn according to law, depose and say, in support of respondent's motion for leave to proceed in forma pauperis:

1. I am counsel for respondent William G. Hale in the above-entitled case, having been appointed by the United States Court of Appeals for the District of Columbia Circuit.

2. Despite diligent efforts to reach the respondent since receiving notice of the government's Petition for Writ of Certiorari, I have been unable to contact him.

3. The United States Court of Appeals for the District of Columbia Circuit granted the respondent leave to proceed in forma pauperis as appellant before that court on the basis of respondent's affidavit that he was unable to pay fees, costs or security therefor.

4. Because I believe in the truth of respondent's affidavit before the United States Court of Appeals and because I am unaware of any facts that would indicate that the respondent is not still impoverished, I believe that he is unable to pay fees, costs or security therefor in the above-entitled case.

5. I believe that respondent is entitled to effectively present his opposition to the petition for certiorari in said case.

6. The nature of said case is breifly stated as follows:

The respondent was tried and convicted of robbery under 22 D.C. Code § 2901 (1971) before the United States District Court for the District of Columbia. He appealed this conviction to the United States Court of Appeals for the District of Columbia Circuit. The United States Court of Appeals reversed his conviction on the ground that respondent, who testified at his trial, was improperly cross-examined on his silence at the time of his arrest. The United States of America has petitioned this Court for a writ of certiorari.

Larry J. Ritchie

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Counsel for Respondent
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600 New Jersey Avenue, N. W.
Washington, D. C. 20001

Duly witnessed and sworn to
before me, a Notary Public,
this 19th day of November
1974.

Anna B. Turner
NOTARY PUBLIC, D. C.
Comm. Exp. - 3/14/77

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

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UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

BEST COPY AVAILABLE

LARRY J. RITCHIE, Esquire
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(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

November 19, 1974

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-364

UNITED STATES OF AMERICA, Petitioner

v.

WILLIAM G. HALE, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit was correct in its ruling that as a matter of local evidentiary law, a defendant who has given exculpatory testimony at trial cannot be cross-examined as to why he failed to offer such information at the time of his arrest.

2. Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

STATEMENT

Along with a co-defendant, the respondent was tried by jury in the United States District Court for the District of Columbia for robbery, in violation of 22 D.C. Code § 2901 (1967). The respondent testified on his own behalf—denying guilt, offering an alibi, and asserting that $158 found in his possession after his arrest was money that his wife had given him in order to purchase money orders for her (Tr. 217-19). He had previously been arrested on a narcotics charge (Tr. 253-54). On cross examination, the prosecutor questioned him about his silence at the police station to which he was brought after his arrest (Tr. 259-260):

> Q. When did they [the police] inform you of the charge?
>
> A. When I was at the precinct.
>
> Q. Did they search you?
>
> A. Yes, they did.
>
> Q. Did you in any way indicate where that money came from?
>
> A. No, I didn't.
>
> Q. Why not?
>
> A. I didn't feel that it was necessary at the time.
>
> Q. You were advised of your rights, were you not?
>
> A. Yes.
>
> THE COURT: He is not required to indicate where the money came from. There is no responsibility on his part in regard to that.
>
> DEFENSE COUNSEL: Thank you, your Honor.
>
> COUNSEL FOR CO-DEFENDANT: I ask that the question and answer be stricken.
>
> THE COURT: I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest.
>
> PROSECUTOR: If he was asked the question--
>
> THE COURT: I have ruled, sir.
>
> PROSECUTOR: All right, your Honor. Fine.

Later, at the bench, counsel for respondent moved for a mistrial because of this questioning (Tr. 261-262):

> DEFENSE COUNSEL: ... I think questioning into whether or not he [respondent] explained where the money came from was highly improper as the Court pointed out. I am not at all sure that an instruction to the jury could cure that.
>
> THE COURT: Do you have any evidence that he gave a contrary statement to the police.
>
> PROSECUTOR: They asked him, "Where did you get the money?" He couldn't account for it.
>
> THE COURT: What did he say?
>
> PROSECUTOR: He wouldn't say anything. He couldn't account for it. They asked him whether he was working or wasn't working. He wouldn't indicate.
>
> . . .
>
> THE COURT: ... Your motion for mistrial is denied.

These are the only portions of the record that are pertinent to the question presented.

The jury voted to convict, but the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the cross-examination of the defendant had been improper. United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974).

ARGUMENT

1. The Court of Appeals held that, as a matter of evidentiary law, a defendant who has given exculpatory testimony at trial cannot be cross-examined as to why he failed to offer such information at the time of his arrest, stating:

> In sum, application of the principles enunciated in Grunewald compels a finding that, as a matter of law, there was nothing inconsistent between

> Hale's silence in interrogation and his alibi at trial. Thus, the basic premise required for triggering the Harris rationale is absent. [498 F.2d at 1043, footnotes omitted].

The court also found such cross-examination to be constitutionally impermissible, stating:

> Even if it could be said that appellant's silence at the police station was inconsistent with his testimony at trial, Harris would nevertheless be inapplicable in the present circumstances. [498 F.2d at 1043].

2. Mr. Hale was convicted of robbery in violation of 22 D. C. Code § 2901. The district court was trying a case brought under a statute which applies only to the District of Columbia and thus was sitting as a local court. See Griffin v. United States, 336 U.S. 704 (1949).[1/] As a local court, the rules of evidence which would apply would not be federal rules of evidence; they would be matters of local law as are the rules of evidence prevailing in the state courts. Griffin v. United States, 336 U.S. 704, 709 (1949).[2/] As stated in Griffin, 336 U.S. at 717: "[T]he law of evidence and procedure governing criminal trials in the District of Columbia is in the keeping of the Court of Appeals for the District and is not to be exercised by this Court."

1/ In fact, this Court has been at pains to point out that "Congress ... recognized the expediency of separate provisions" pertaining to criminal justice applicable exclusively to the District of Columbia in contradistinction to the Criminal Code governing offenses amenable to federal jurisdictions elsewhere. Johnson v. United States, 225 U.S. 405, 418. Griffin v. United States, 336 U.S. 704, 713 (1949).

2/ As stated in Griffin at page 717:

> [I]t has become settled practice for this court to recognize that the formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined—in the absence of specific Congressional legislation—by the highest appellate court for the District.

3. A uniformly recognized principle of evidence is that the credibility of a person who takes the witness stand to testify may be impeached by the showing of a prior inconsistent statement made by the witness. McCORMICK, EVIDENCE §§ 34-37 (1972). Whether silence can amount to a statement depends on the factual circumstances of the case.[3/] Whether a failure to assert a fact will amount in effect to an assertion of the non-existence of the fact depends on whether it would have been natural under the circumstances to assert the fact. III A WIGMORE, EVIDENCE § 1042 (Chadbourn rev. 1972). Identical considerations apply to the determination of whether silence can be used as a tacit admission (adoption of the statement of another by silence). IV WIGMORE, EVIDENCE § 1071 (Chadbourn rev. 1972).[4/] In both situations, prior to the introduction of silence as a statement, it must be found that there was a confrontation or a statement made by another which would under the circumstances naturally call for a reply.

Whenever there is a preliminary question of fact which must be determined prior to the introduction of evidence, the factual question is to be decided by the judge outside of the hearing of the jury. Proposed

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3/ The Proposed Federal Rules of Evidence, Rule 801(a) define "statement" as follows: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

4/ See also Note, "Tacit Criminal Admissions", 112 U. Penn. L. Rev. 210, 215-16 (1963), where it is stated:

> [C]ourts generally have imposed seven conditions for the introduction of evidence that an alleged admission by silence occurred. If silence is the only response by the defendant, the accusation must have occurred (1) in the defendant;s presence and (2) within his hearing; (3) he must have understood it; (4) it ordinarily must have embraced facts within his personal knowledge; (5) he must have been physically able to speak and (6) psychologically at liberty to speak; and (7) the statement and surrounding circumstances must have naturally called for a reply. [footnotes omitted].

Federal Rules of Evidence, Rule 104.[5] In this case, there was never any showing by the government that a statement had been made or a question directed to Mr. Hale by the police officers. The only proffer of any sort by the government was the response to the court's question during the bench conference at which the motion for a mistrial was made. (Tr. 261-262).[6] It would thus appear from the record and from

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5/ "[T]he question of fact whether the party's conduct manifested his assent to the statement of the other person is a preliminary question for the judge. Unless he so finds, the statement is excluded." [footnote omitted].

Naples v. United States, 120 U.S. App. D.C. 123, 344 F.2d 508, 512 (1964) [quoting from McCORMICK, EVIDENCE, § 246, at 527 (1964)].

> It is of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evidence, § 1040. [emphasis added].

Grunewald,v. United States, 353 U.S. 391, 418-19 (1957).

> The theory underlying this rule is that the natural reaction of an innocent man to an untrue accusation is to enter a prompt denial. Where his response is silence, envasion, or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. Where the trial judge determines that such an inference may be drawn, the statement is then admitted, not as substantive evidence in proof of the fact asserted but merely as a basis for showing the reaction of the accused to it.

People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, 25 (1946).

6/ As stated by Judge Wilkey in his dissenting opinion below, 498 F.2d at 1047:

> Reg. 'fully, I must point out that the dialogue—in quotes—my colleagues cite in the text at note 7 and in note 12, as testimony as to what defendant Hale said

the manner in which the question presented is phrased in the petition for certiorari, that the government's position is that a suspect under arrest would naturally volunteer exculpatory information to the police.

Even assuming that there was a question directed to Mr. Hale by the police, before the prosecutor can use his silence as a statement, the circumstances must have been such that it would have been natural to reply. The circumstances were that Mr. Hale had just been arrested on the street for robbery, taken into the police station, searched, and advised of his right to remain silent. It should also be noted that Hale was no stranger to police procedures, having been arrested on a previous occasion.

Many jurisdictions have adopted a "per se" rule that the arrest of an accused excludes evidence of a subsequent admission by silence.

As stated in People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, 26 (1946):

> It is also apparent that when a person is in the hands of his accusers he may well and soundly conclude that his best interests will be served by silence, evasiveness, or equivocation. For this reason, in a number of jurisdictions it has been held that the mere fact of arrest is sufficient to render inadmissible the fact of the accused's failure to deny accusatory statements when made in his presence and hearing. These courts maintain that it is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent; that the maintenance of silence is the best strategic policy for one in the custody of the law, and that it entirely consistent with innocence. [citations omitted].

(Fn. 6 cont.) in answer to police questioning, is not evidence at all. Hale never testified to this, no police witnesses testified to this, the jury never heard any such words. The "dialogue" is lifted from a bench conference at which the Assistant U.S. Attorney purported to give his belief as to what occurred at the police station. The jury never would have been permitted to receive any such hearing from the prosecutor, who of course was never there.

In Kelly v. United States, 99 U.S. App. D.C. 13, 236 F.2d 746, 749 (1956), the court discussed some of the motives which might cause an accused under arrest to remain silent in the face of accusation. The court quoted from the case of State v. Hester, 137 S.C. 145, 185, 134 S.E. 885, 898-899 (1926):

> [I]t cannot be disputed that many people, and even persons who are entirely innocent of wrongdoing, are afraid to talk in the presence of detectives. We must not forget, too, that from time immemorial it has generally been conceded an unwise thing for those charged with criminal offenses to talk to anybody and everybody about their cases, and especially to engage in conversation with those who may not be friendly to them. For years and years the members of the bar have cautioned their clients not to discuss their cases with those with whom they came in contact, unless absolutely assured of their friendship, and many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has become a well-known fact to our people generally.

The court also quoted from the case of O'Hearn v. State, 79 Neb. 513, 522, 113 N.W. 130, 134 (1907):

> [T]he very surroundings of the accused in such cases are such as to render it entirely proper and natural for him to keep silent in the fear of misquotation or misconstruction. A person in such a situation would naturally fear that the worst possible interpretation would be placed upon his language, that the memories of those present would to statements prejudicial to his interests, and that an officer seeking to convict might supply through zeal any defect in the statement which was actually made.

Apparently, the District of Columbia has not adopted the "per se" rule in the tacit admissions area, but would look to all of the surrounding circumstances. In Naples v. United States, 120 U.S. App. D.C. 123, 344 F.2d 508, 511 (1964),[7/] the court stated:

7/ See also Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F.2d 633 (1957); Skiskowski v. United States, 81 U.S. App. D.C. 274, 158 F.2d 177 (1946).

> Testimony that an accused adopted statements of another person as his own admissions may be let in under this exception [adoptive admissions] if it clearly appears that the accused understood and unambiguously assented to those statements.

There is, however, an additional factor (other than arrest) involved in Mr. Hale's case—he was told by the police officer that he had the right to remain silent and that anything which he said could be used against him. Particularly in view of this warning, as an evidentiary matter, silence at the police station after his arrest is not inconsistent with Mr. Hale's offering of exculpatory testimony at his trial. There is simply no inconsistent statement for use as impeaching material.

In Fowle v. United States, 410 F.2d 48 (9 Cir. 1969), the defendant, accused of a narcotics violation, took the stand in his own defense and testified to certain exculpatory facts. The prosecutor on cross-examination inquired into the defendant's silence at the time of his arrest. The Ninth Circuit (like the D.C. Circuit in Hale) reversed the conviction on two grounds—the evidentiary point and the constitutional issue. In discussing the principle of evidence law, the court at page 50 stated:

> A person's silence in most circumstances is so highly ambiguous that it is generally inadmissible, for its lack of probative value, on the question of whether, by his silence, that person has expressed agreement or disagreement with contemporaneous statements of others. One situation in which silence has been deemed more meaningful and thought to be so significant as to have probative weight is the case wherein it persists in the face of accusation. It has been assumed that an accused, in such circumstances would, more likely than not, dispute untrue accusations. It was upon this implicit assumption that the Raffel court held that the prior silence of the accused was admissible. There are, however, situations in which an accused is clearly under no duty to speak and where there are

> important reasons, regardless of guilt or innocence, for his maintaining silence. In such circumstances, since innocent and guilty alike may choose to stand mute, silence, even in the face of accusation, is highly ambiguous; hence, proof of such former silence should be excluded under universally recognized principles of evidence [citations omitted].

Considering the prosecutor's use of Fowle's silence as purely a question of evidence law, the court found a solid basis for reversal. 410 F.2d at 51.

Having been arrested and warned of his right to silence and that anything he said could be used against him, it is impossible to say that Mr. Hale would naturally have replied to questions put to him by police officers, by offering exculpatory information which he later offered at trial. As stated in Fagundes v. United States, 340 F.2d 673, 677 (1 Cir. 1965):

> When one takes the stand in his own defense he of course puts his credibility as a witness in issue. Nevertheless we think it reversible error to permit evidence of refusal to talk and of request for counsel on arrest to be used for the purpose of impeachment. In the first place such evidence is ambiguous. Fagundes' words when arrested can as well be taken as indicating reliance upon constitutional rights as supporting an inference that his ability was an afterthought. There is nothing to indicate which interpretation is more probable. Cf. Grunewald v. United States, 353 U.S. 391, 415-524, 77 S.Ct. 963, 1 L.Ed. 2d 931 (1957).

See also Johnson v. Patterson, 475 F. 2d 1006, 1068 (10 Cir. 1973); Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968).

4. In Grunewald v. United States, 353 U.S. 391, 420 (1957), relied on by the court below, this Court found improper the cross-examination of a defendant as to his silence before a grand jury because, in the circumstances of the case, the probative value on the issue of credibility was so negligible as to be far outweighed by its

possible impermissible and prejudicial impact on the jury. In that case, the Court was reviewing the federal rules of evidence and was exercising its supervisory control over the federal courts. The decision in the Hale case is not in conflict with Grunewald—indeed, it relies on the Grunewald decision. However, in any event, the District of Columbia Court of Appeals was sitting in Hale as a local court passing on local rules of evidence. See Griffin v. United States, 336 U.S. 704 (1949).

The constitutional considerations descussed by the court in the Hale case are unnecessary to its decision and do not have to be reached. If this Court were to accept certiorari in this case, the issue of whether the prosecutor's question was constitutionally permissible would not be reached because of the proper disposition of the case by the court below on local evidentiary principles. Indeed, the Court would be faced again with much the same situation posed in the Griffin case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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